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ONTARIO LABOUR RELATIONS BOARD REPORTS

July/August 1997



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ONTARIO LABOUR RELATIONS BOARD REPORTS

A Bimonthly Series of Decisions from the
Ontario Labour Relations Board

Cited [1997] OLRB REP. JULY/AUGUST

EDITOR: RON LEBI

Selected decisions of particular reference value are
also reported in *Canadian Labour Relations Boards
Reports*, Butterworth & Co., Toronto.



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ONTARIO HYDRO AND THE ELECTRICAL POWER SYSTEMS CONSTRUCTION ASSOCIATION; RE ONTARIO ALLIED CONSTRUCTION TRADES COUNCIL AND LIUNA, LOCAL 506

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First Contract Arbitration - Natural Justice - Reconsideration - Unfair Labour Practice - Board earlier directing settlement of first collective agreement by arbitration - Employer seeking reconsideration of decision on grounds of reasonable apprehension of bias - Employer submitting that apprehension of bias arising because on or about the date of the Board's earlier decision, vice-chair of the panel entered into a retainer agreement with the Canadian Air Line Pilots Association (CALPA) - Employer also relying on fact that vice-chair had discussions with CALPA regarding the retainer prior to date of Board's decision - Board not agreeing that circumstances giving rise to reasonable apprehension of bias - Reconsideration request denied

DOVER CORPORATION (CANADA) LIMITED INDUSTRIAL DIVISION; RE NATIONAL AUTOMOBILE, AEROSPACE, TRANSPORTATION AND GENERAL WORKERS UNION OF CANADA (CAW-CANADA)

568

First Contract Arbitration - Practice and Procedure - Termination - Board earlier deciding to hear first contract application first and to defer consideration of termination application - After several days of hearing, employer and union settling first contract application on basis of consent order directing settlement of first collective agreement by arbitration - Board dismissing termination application pursuant to section 43(23) of the Act

EAST SIDE MARIO'S, BIRSSA HOLDINGS INC. C.O.B. AS; RE LYNDIA ANN FALVO; RE UFCW, LOCALS 175/633

574

Health and Safety - Arbitration - Union representing Crown employee filing complaint alleging unlawful reprisal contrary to Occupational Health and Safety Act (OHSA) and Smoking in the Workplace Act - Employer asserting that Labour Relations Board not having jurisdiction because employee had earlier elected to have subject matter of complaint heard by Grievance Settlement Board - Board not accepting union's submission that section 50(6) of OHSA gives Labour Relations Board exclusive jurisdiction where the complainant is a Crown employee - Board accepting employer's submission regarding effect of employee's election - Application dismissed

CROWN IN RIGHT OF ONTARIO (MINISTRY OF THE SOLICITOR GENERAL AND CORRECTIONAL SERVICES), THE AND I. HADDEN, A. DVORAK, R. LUNDY; RE OPSEU, BILL WALLS

562

Health and Safety - Discharge - Applicant alleging that she was fired as a result of complaints of sexual harassment and that in making those complaints she was exercising rights under the Occupational Health and Safety Act - Board concluding that applicant's termination was not motivated by complaints of harassment - Application dismissed

LYNDHURST HOSPITAL; RE PAULINE AU

616

Hospital Labour Disputes Arbitration Act - Remedies - Sale of a Business - Parties agreeing that merger of hospitals constituting sale of a business, that the relevant bargaining units be merged, and that a representation vote between the incumbent unions be held to determine the new bargaining agent - Board ruling that collective agreement of winning union applies to all of the employees in the bargaining unit after a vote held under section 69(8) of the Act - Board determining that because all the bargaining units are covered by the statutory "freeze", the

Board's declarations under section 69(4) of the Act should be made retroactive to the date of application

WEST PARRY SOUND HEALTH CENTRE; RE CUPE, LOCAL 1473, OPSEU, LOCAL 320 AND SEU, LOCAL 478.....

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Interim Relief - Duty to Bargain in Good Faith - Remedies - Unfair Labour Practice - On eve of strike, employer unilaterally transferring seven bargaining unit positions outside of bargaining unit - Union filing unfair labour practice complaint and asking for interim order requiring employer to continue to recognize union as exclusive bargaining agent for the seven individuals holding the disputed positions - Board concluding that balance of harm weighing in favour of union - Application for interim order granted pending disposition or resolution of unfair labour practice complaint

REGIONAL MUNICIPALITY OF NIAGARA, THE; RE CUPE, LOCAL 1287.....

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Intimidation and Coercion - Certification - Certification Where Act Contravened - Construction Industry - Evidence - Practice and Procedure - Remedies - Representation Vote - Union alleging that employer making certain threats and that union should be certified under section 11 of the Act - Employer asking Board to entertain subjective testimony of employees regarding whether they felt able to vote freely and whether their own votes reflected their true wishes regarding union representation - Board ruling that proffered evidence not relevant and inadmissible - Board finding that employer's sharing of its "economic analysis" with its employees was not a legitimate exercise of free speech, but designed to intimidate and coerce employees - Board finding that four statutory pre-conditions to certification under section 11 of the Act met - Certificates issuing

JAK ELECTRICAL CONTRACTORS LIMITED; RE IBEW, LOCAL 353

578

Judicial Review - Certification - Certification Where Act Contravened - Charter of Rights - Constitutional Law - Representation Vote - Board concluding that conduct of employer in circulating amongst employees and engaging them in individual and group discussions regarding the union violating section 70 of the Act - Employer's refusal to answer questions regarding closing of store if union certified amounting to intentionally generated implied threat to employees' job security and also violating the Act - Board concluding that results of representation vote not disclosing employees' true wishes, that no remedy short of automatic certification sufficient to counter effect of employer contraventions, and that union holding membership support sufficient for collective bargaining - Union certified under section 11 of the Act - Applications for judicial review brought by employer and by objecting employees dismissed by Divisional Court

WAL-MART CANADA INC.; RE USWA AND THE OLRB; RE TIZIANI ALFINI ET AL.; RE OLRB, JANICE JOHNSTON, VICE-CHAIR, H. PEACOCK, BOARD MEMBER R.W. PIRRIE, BOARD MEMBER AND USWA

810

Lock-Out - Related Employer - Remedies - Sale of a Business - Board not accepting submission that assignment in bankruptcy or that bankruptcy court orders should cause Board not to find sale of a business - Sale of a business and single employer declarations issuing - Board finding that successor employer's refusal to re-open plant closed by predecessor so long as employees there do not agree to concessions amounting to technical unlawful lock-out - Board declining to make cease and desist order in order to permit continuation of bargaining between the parties

VULCAN CONTAINERS LTD. AND VULCAN CONTAINERS (ONTARIO) LTD., VULCAN PACKAGING INC.; RE NATIONAL AUTOMOBILE, AEROSPACE, TRANSPORTATION AND GENERAL WORKERS UNION OF CANADA (CAW-CANADA) AND ITS LOCAL 1008.....

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Membership Evidence - Certification - Construction Industry - Evidence - Parties - Practice and Procedure - Representation Vote - IBEW Local 1687 applying to represent certain construction

electricians employed by Ontario Hydro - Board earlier conducting pre-hearing representation vote and sealing box - Board concluding that PWU has no standing to participate further in proceeding as of right and that there is no reason to grant standing in exercise of Board's discretion - Board not satisfied that membership evidence filed by PWU conferring sufficient representational authority to permit PWU to participate in IBEW application - Board not persuaded that PWU can be permitted to rely on its collective agreement with Ontario Hydro as basis for standing - Board finding no justification to give PWU amicus curiae status - Board also deciding against opening sealed ballot box and counting ballots - Board directing hearing with respect to remaining outstanding issues	
ONTARIO HYDRO; RE IBEW, LOCAL 1687; RE POWER WORKERS' UNION, CUPE LOCAL 1000 (PWU), IBEW, LOCAL 1788, EPSCA, THE ELECTRICAL CONTRACTORS ASSOCIATION OF ONTARIO (ECAO); RE GROUP OF EMPLOYEES	700
Natural Justice - First Contract Arbitration - Reconsideration - Unfair Labour Practice - Board earlier directing settlement of first collective agreement by arbitration - Employer seeking reconsideration of decision on grounds of reasonable apprehension of bias - Employer submitting that apprehension of bias arising because on or about the date of the Board's earlier decision, vice-chair of the panel entered into a retainer agreement with the Canadian Air Line Pilots Association (CALPA) - Employer also relying on fact that vice-chair had discussions with CALPA regarding the retainer prior to date of Board's decision - Board not agreeing that circumstances giving rise to reasonable apprehension of bias - Reconsideration request denied	
DOVER CORPORATION (CANADA) LIMITED INDUSTRIAL DIVISION; RE NATIONAL AUTOMOBILE, AEROSPACE, TRANSPORTATION AND GENERAL WORKERS UNION OF CANADA (CAW-CANADA)	568
Parties - Certification - Construction Industry - Evidence - Membership Evidence - Practice and Procedure - Representation Vote - IBEW Local 1687 applying to represent certain construction electricians employed by Ontario Hydro - Board earlier conducting pre-hearing representation vote and sealing box - Board concluding that PWU has no standing to participate further in proceeding as of right and that there is no reason to grant standing in exercise of Board's discretion - Board not satisfied that membership evidence filed by PWU conferring sufficient representational authority to permit PWU to participate in IBEW application - Board not persuaded that PWU can be permitted to rely on its collective agreement with Ontario Hydro as basis for standing - Board finding no justification to give PWU amicus curiae status - Board also deciding against opening sealed ballot box and counting ballots - Board directing hearing with respect to remaining outstanding issues	
ONTARIO HYDRO; RE IBEW, LOCAL 1687; RE POWER WORKERS' UNION, CUPE LOCAL 1000 (PWU), IBEW, LOCAL 1788, EPSCA, THE ELECTRICAL CONTRACTORS ASSOCIATION OF ONTARIO (ECAO); RE GROUP OF EMPLOYEES	700
Practice and Procedure - Certification - Certification Where Act Contravened - Construction Industry - Evidence - Intimidation and Coercion - Remedies - Representation Vote - Union alleging that employer making certain threats and that union should be certified under section 11 of the Act - Employer asking Board to entertain subjective testimony of employees regarding whether they felt able to vote freely and whether their own votes reflected their true wishes regarding union representation - Board ruling that proffered evidence not relevant and inadmissible - Board finding that employer's sharing of its "economic analysis" with its employees was not a legitimate exercise of free speech, but designed to intimidate and coerce employees - Board finding that four statutory pre-conditions to certification under section 11 of the Act met - Certificates issuing	
JAK ELECTRICAL CONTRACTORS LIMITED; RE IBEW, LOCAL 353	578
Practice and Procedure - Certification - Construction Industry - Evidence - Membership Evidence - Parties - Representation Vote - IBEW Local 1687 applying to represent certain construction	

electricians employed by Ontario Hydro - Board earlier conducting pre-hearing representation vote and sealing box - Board concluding that PWU has no standing to participate further in proceeding as of right and that there is no reason to grant standing in exercise of Board's discretion - Board not satisfied that membership evidence filed by PWU conferring sufficient representational authority to permit PWU to participate in IBEW application - Board not persuaded that PWU can be permitted to rely on its collective agreement with Ontario Hydro as basis for standing - Board finding no justification to give PWU amicus curiae status - Board also deciding against opening sealed ballot box and counting ballots - Board directing hearing with respect to remaining outstanding issues

ONTARIO HYDRO; RE IBEW, LOCAL 1687; RE POWER WORKERS' UNION, CUPE LOCAL 1000 (PWU), IBEW, LOCAL 1788, EPSCA, THE ELECTRICAL CONTRACTORS ASSOCIATION OF ONTARIO (ECAO); RE GROUP OF EMPLOYEES

700

Practice and Procedure - Certification - Representation Vote - Security Guards - Applicant union's earlier certification application withdrawn prior to representation vote - Union filing new application for different, but overlapping bargaining unit - Employer and intervening union asserting that new application should be barred - Board ordering vote and directing that "bar" issue be dealt with at hearing after the vote, if necessary - Applicant asking Board to order employer to provide it with names and addresses of all bargaining unit employees - Applicant's request denied - Board directing employer to mail copies of Board's decision and Notice of Vote to all individuals in voting constituency

NORTH AMERICAN SECURITY SERVICES INC.; RE USWA; RE CANADIAN UNION OF PROFESSIONAL SECURITY-GUARDS

657

Practice and Procedure - Charter of Rights and Freedoms - Constitutional Law - Construction Industry - Construction Industry Grievance - Discharge - Evidence - Construction labourer discharged by Ontario Hydro for possessing and smoking marijuana at work and grieving that discharge was without just cause - Union seeking to exclude certain evidence on Charter grounds - Board finding evidence to establish just cause apart from evidence sought to be excluded - Board, therefore, not making any decision on union's Charter arguments - Union claiming that grievor's drug use was rooted in drug dependency that should be treated as a disease or disability requiring accommodation, rather than discipline - Board not satisfied that evidence establishing that grievor addicted or that he had come to grips with his situation - Grievance dismissed

ONTARIO HYDRO AND THE ELECTRICAL POWER SYSTEMS CONSTRUCTION ASSOCIATION; RE ONTARIO ALLIED CONSTRUCTION TRADES COUNCIL AND LIUNA, LOCAL 506

680

Practice and Procedure - First Contract Arbitration - Termination - Board earlier deciding to hear first contract application first and to defer consideration of termination application - After several days of hearing, employer and union settling first contract application on basis of consent order directing settlement of first collective agreement by arbitration - Board dismissing termination application pursuant to section 43(23) of the Act

EAST SIDE MARIO'S, BIRSSA HOLDINGS INC. C.O.B. AS; RE LYNDIA ANN FALVO; RE UFCW, LOCALS 175/633

574

Reconsideration - Bargaining Unit - Certification - Representation Vote - Union applying to represent bargaining unit of part-time and casual nurses employed by hospital - Board earlier directing that vote be held on fifth day after application was filed - Vote held on Friday before long week-end - Board rejecting employer's submission that employees had insufficient notice of the vote and insufficient access to the voting itself - Request to reconsider earlier decision ordering vote dismissed - Union describing appropriate bargaining unit as including all part-time and casual nurses "employed in a nursing capacity" - Employer submitting that bargaining unit should mirror existing full-time unit and so should be limited to those "engaged in nursing

care” - Board concluding that part-time unit that would include nurses not involved in direct nursing care would cause employer labour relations problems of a substantial nature - Board accepting employer’s bargaining unit description as appropriate - Final certificate issuing

MOUNT SINAI HOSPITAL; RE ONA 651

Reconsideration - First Contract Arbitration - Natural Justice - Unfair Labour Practice - Board earlier directing settlement of first collective agreement by arbitration - Employer seeking reconsideration of decision on grounds of reasonable apprehension of bias - Employer submitting that apprehension of bias arising because on or about the date of the Board’s earlier decision, vice-chair of the panel entered into a retainer agreement with the Canadian Air Line Pilots Association (CALPA) - Employer also relying on fact that vice-chair had discussions with CALPA regarding the retainer prior to date of Board’s decision - Board not agreeing that circumstances giving rise to reasonable apprehension of bias - Reconsideration request denied

DOVER CORPORATION (CANADA) LIMITED INDUSTRIAL DIVISION; RE NATIONAL AUTOMOBILE, AEROSPACE, TRANSPORTATION AND GENERAL WORKERS UNION OF CANADA (CAW-CANADA) 568

Related Employer - Lock-Out - Remedies - Sale of a Business - Board not accepting submission that assignment in bankruptcy or that bankruptcy court orders should cause Board not to find sale of a business - Sale of a business and single employer declarations issuing - Board finding that successor employer’s refusal to re-open plant closed by predecessor so long as employees there do not agree to concessions amounting to technical unlawful lock-out - Board declining to make cease and desist order in order to permit continuation of bargaining between the parties

VULCAN CONTAINERS LTD. AND VULCAN CONTAINERS (ONTARIO) LTD., VULCAN PACKAGING INC.; RE NATIONAL AUTOMOBILE, AEROSPACE, TRANSPORTATION AND GENERAL WORKERS UNION OF CANADA (CAW-CANADA) AND ITS LOCAL 1008 765

Remedies - Certification - Certification Where Act Contravened - Construction Industry - Evidence - Intimidation and Coercion - Practice and Procedure - Representation Vote - Union alleging that employer making certain threats and that union should be certified under section 11 of the Act - Employer asking Board to entertain subjective testimony of employees regarding whether they felt able to vote freely and whether their own votes reflected their true wishes regarding union representation - Board ruling that proffered evidence not relevant and inadmissible - Board finding that employer’s sharing of its “economic analysis” with its employees was not a legitimate exercise of free speech, but designed to intimidate and coerce employees - Board finding that four statutory pre-conditions to certification under section 11 of the Act met - Certificates issuing

JAK ELECTRICAL CONTRACTORS LIMITED; RE IBEW, LOCAL 353 578

Remedies - Construction Industry - Damages - Discharge - Unfair Labour Practice - Employer acknowledging violation of the Act but parties disputing appropriate remedy - Board rejecting submission that reinstatement not appropriate - Employer directed to offer grievor position if its employee complement expands to more than 20 employees in 1997 - Board making no order regarding 1998 - Board finding delay in filing complaint not unreasonable and requiring no reduction in damages to which grievor otherwise entitled - Board also finding grievor’s attempts at mitigation reasonable - Board deducting workers’ compensation benefits received during 5 month period from damages to which grievor otherwise entitled - Board finding that but for employer’s wrongful conduct, grievor would have earned sufficient credits to entitle him to employment insurance benefits during two periods of lay-off and Board ordering damages in that respect as well

TORBRIDGE CONSTRUCTION LTD.; RE LIUNA, LOCAL 183 751

Remedies - Duty to Bargain in Good Faith - Interim Relief - Unfair Labour Practice - On eve of strike, employer unilaterally transferring seven bargaining unit positions outside of bargaining unit - Union filing unfair labour practice complaint and asking for interim order requiring employer to continue to recognize union as exclusive bargaining agent for the seven individuals holding the disputed positions - Board concluding that balance of harm weighing in favour of union - Application for interim order granted pending disposition or resolution of unfair labour practice complaint

REGIONAL MUNICIPALITY OF NIAGARA, THE; RE CUPE, LOCAL 1287..... 733

Remedies - Duty to Bargain in Good Faith - Strike - Unfair Labour Practice - Employer's proposal made in January for new collective agreement rejected and employees striking - Union and employees purporting to accept proposal in March - Board satisfied that January proposal had been extinguished by passage of time and in context of long strike - Board finding that employer's rejection of union's repeated overtures to return to bargaining violating its duty to bargain - Board also finding that employer's April proposal for a new collective agreement was designed to invite rejection and was in breach of the Act - Application allowed - Parties directed to return to bargaining forthwith to bargain in good faith and to make every reasonable effort to reach a collective agreement

PC WORLD, CIRCUIT WORLD CORPORATION, OPERATING AS; RE NATIONAL AUTOMOBILE, AEROSPACE AND AGRICULTURAL IMPLEMENT WORKERS UNION OF CANADA (CAW-CANADA), LOCAL 124 711

Remedies - Hospital Labour Disputes Arbitration Act - Sale of a Business - Parties agreeing that merger of hospitals constituting sale of a business, that the relevant bargaining units be merged, and that a representation vote between the incumbent unions be held to determine the new bargaining agent - Board ruling that collective agreement of winning union applies to all of the employees in the bargaining unit after a vote held under section 69(8) of the Act - Board determining that because all the bargaining units are covered by the statutory "freeze", the Board's declarations under section 69(4) of the Act should be made retroactive to the date of application

WEST PARRY SOUND HEALTH CENTRE; RE CUPE, LOCAL 1473, OPSEU, LOCAL 320 AND SEU, LOCAL 478..... 794

Remedies - Lock-Out - Related Employer - Sale of a Business - Board not accepting submission that assignment in bankruptcy or that bankruptcy court orders should cause Board not to find sale of a business - Sale of a business and single employer declarations issuing - Board finding that successor employer's refusal to re-open plant closed by predecessor so long as employees there do not agree to concessions amounting to technical unlawful lock-out - Board declining to make cease and desist order in order to permit continuation of bargaining between the parties

VULCAN CONTAINERS LTD. AND VULCAN CONTAINERS (ONTARIO) LTD., VULCAN PACKAGING INC.; RE NATIONAL AUTOMOBILE, AEROSPACE, TRANSPORTATION AND GENERAL WORKERS UNION OF CANADA (CAW-CANADA) AND ITS LOCAL 1008..... 765

Representation Vote - Bargaining Unit - Certification - Reconsideration - Union applying to represent bargaining unit of part-time and casual nurses employed by hospital - Board earlier directing that vote be held on fifth day after application was filed - Vote held on Friday before long week-end - Board rejecting employer's submission that employees had insufficient notice of the vote and insufficient access to the voting itself - Request to reconsider earlier decision ordering vote dismissed - Union describing appropriate bargaining unit as including all part-time and casual nurses "employed in a nursing capacity" - Employer submitting that bargaining unit should mirror existing full-time unit and so should be limited to those "engaged in nursing care" - Board concluding that part-time unit that would include nurses not involved in direct

nursing care would cause employer labour relations problems of a substantial nature - Board accepting employer's bargaining unit description as appropriate - Final certificate issuing	
MOUNT SINAI HOSPITAL; RE ONA	651
Representation Vote - Certification - Certification Where Act Contravened - Charter of Rights - Constitutional Law - Judicial Review - Board concluding that conduct of employer in circulating amongst employees and engaging them in individual and group discussions regarding the union violating section 70 of the Act - Employer's refusal to answer questions regarding closing of store if union certified amounting to intentionally generated implied threat to employees' job security and also violating the Act - Board concluding that results of representation vote not disclosing employees' true wishes, that no remedy short of automatic certification sufficient to counter effect of employer contraventions, and that union holding membership support sufficient for collective bargaining - Union certified under section 11 of the Act - Applications for judicial review brought by employer and by objecting employees dismissed by Divisional Court	
WAL-MART CANADA INC.; RE USWA AND THE OLRB; RE TIZIANI ALFINI ET AL.; RE OLRB, JANICE JOHNSTON, VICE-CHAIR, H. PEACOCK, BOARD MEMBER R.W. PIRRIE, BOARD MEMBER AND USWA	810
Representation Vote - Certification - Certification Where Act Contravened - Construction Industry - Evidence - Intimidation and Coercion - Practice and Procedure - Remedies - Union alleging that employer making certain threats and that union should be certified under section 11 of the Act - Employer asking Board to entertain subjective testimony of employees regarding whether they felt able to vote freely and whether their own votes reflected their true wishes regarding union representation - Board ruling that proffered evidence not relevant and inadmissible - Board finding that employer's sharing of its "economic analysis" with its employees was not a legitimate exercise of free speech, but designed to intimidate and coerce employees - Board finding that four statutory pre-conditions to certification under section 11 of the Act met - Certificates issuing	
JAK ELECTRICAL CONTRACTORS LIMITED; RE IBEW, LOCAL 353	578
Representation Vote - Certification - Construction Industry - Evidence - Membership Evidence - Parties - Practice and Procedure - IBEW Local 1687 applying to represent certain construction electricians employed by Ontario Hydro - Board earlier conducting pre-hearing representation vote and sealing box - Board concluding that PWU has no standing to participate further in proceeding as of right and that there is no reason to grant standing in exercise of Board's discretion - Board not satisfied that membership evidence filed by PWU conferring sufficient representational authority to permit PWU to participate in IBEW application - Board not persuaded that PWU can be permitted to rely on its collective agreement with Ontario Hydro as basis for standing - Board finding no justification to give PWU amicus curiae status - Board also deciding against opening sealed ballot box and counting ballots - Board directing hearing with respect to remaining outstanding issues	
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Representation Vote - Certification - Practice and Procedure - Security Guards - Applicant union's earlier certification application withdrawn prior to representation vote - Union filing new application for different, but overlapping bargaining unit - Employer and intervening union asserting that new application should be barred - Board ordering vote and directing that "bar" issue be dealt with at hearing after the vote, if necessary - Applicant asking Board to order employer to provide it with names and addresses of all bargaining unit employees - Applicant's	

request denied - Board directing employer to mail copies of Board's decision and Notice of Vote to all individuals in voting constituency

NORTH AMERICAN SECURITY SERVICES INC.; RE USWA; RE CANADIAN UNION OF PROFESSIONAL SECURITY-GUARDS 657

Representation Vote - Certification - Security Guards - Union applying to represent bargaining unit of 140 security guards working at 36 locations - Applicant asking for Board order directing employer to produce labels containing names and addresses of each person on voters' list so as to allow union to mail written materials to employees before holding of representation vote - Board making requested order and directing that costs associated with mailing be borne by union

PROVINCIAL SECURITY SERVICES LTD.; RE USWA 730

Representation Vote - Employee - Certification - Board determining that two individuals with sporadic contact with workplace and who perform work on an erratic and irregular basis are not in an employment relationship with employer and not eligible to vote in representation vote

BLACK PHOTO CORPORATION; RE UNION OF NEEDLETRADES, INDUSTRIAL AND TEXTILE EMPLOYEES ONTARIO DISTRICT COUNCIL; RE GROUP OF EMPLOYEES . 559

Sale of a Business - Hospital Labour Disputes Arbitration Act - Remedies - Parties agreeing that merger of hospitals constituting sale of a business, that the relevant bargaining units be merged, and that a representation vote between the incumbent unions be held to determine the new bargaining agent - Board ruling that collective agreement of winning union applies to all of the employees in the bargaining unit after a vote held under section 69(8) of the Act - Board determining that because all the bargaining units are covered by the statutory "freeze", the Board's declarations under section 69(4) of the Act should be made retroactive to the date of application

WEST PARRY SOUND HEALTH CENTRE; RE CUPE, LOCAL 1473, OPSEU, LOCAL 320 AND SEU, LOCAL 478 794

Sale of a Business - Lock-Out - Related Employer - Remedies - Board not accepting submission that assignment in bankruptcy or that bankruptcy court orders should cause Board not to find sale of a business - Sale of a business and single employer declarations issuing - Board finding that successor employer's refusal to re-open plant closed by predecessor so long as employees there do not agree to concessions amounting to technical unlawful lock-out - Board declining to make cease and desist order in order to permit continuation of bargaining between the parties

VULCAN CONTAINERS LTD. AND VULCAN CONTAINERS (ONTARIO) LTD., VULCAN PACKAGING INC.; RE NATIONAL AUTOMOBILE, AEROSPACE, TRANSPORTATION AND GENERAL WORKERS UNION OF CANADA (CAW-CANADA) AND ITS LOCAL 1008 765

Security Guards - Certification - Practice and Procedure - Representation Vote - Applicant union's earlier certification application withdrawn prior to representation vote - Union filing new application for different, but overlapping bargaining unit - Employer and intervening union asserting that new application should be barred - Board ordering vote and directing that "bar" issue be dealt with at hearing after the vote, if necessary - Applicant asking Board to order employer to provide it with names and addresses of all bargaining unit employees - Applicant's request denied - Board directing employer to mail copies of Board's decision and Notice of Vote to all individuals in voting constituency

NORTH AMERICAN SECURITY SERVICES INC.; RE USWA; RE CANADIAN UNION OF PROFESSIONAL SECURITY-GUARDS 657

Security Guards - Certification - Representation Vote - Union applying to represent bargaining unit of 140 security guards working at 36 locations - Applicant asking for Board order directing

employer to produce labels containing names and addresses of each person on voters' list so as to allow union to mail written materials to employees before holding of representation vote - Board making requested order and directing that costs associated with mailing be borne by union

PROVINCIAL SECURITY SERVICES LTD.; RE USWA 730

Strike - Duty to Bargain in Good Faith - Remedies - Unfair Labour Practice - Employer's proposal made in January for new collective agreement rejected and employees striking - Union and employees purporting to accept proposal in March - Board satisfied that January proposal had been extinguished by passage of time and in context of long strike - Board finding that employer's rejection of union's repeated overtures to return to bargaining violating its duty to bargain - Board also finding that employer's April proposal for a new collective agreement was designed to invite rejection and was in breach of the Act - Application allowed - Parties directed to return to bargaining forthwith to bargain in good faith and to make every reasonable effort to reach a collective agreement

PC WORLD, CIRCUIT WORLD CORPORATION, OPERATING AS; RE NATIONAL AUTOMOBILE, AEROSPACE AND AGRICULTURAL IMPLEMENT WORKERS UNION OF CANADA (CAW-CANADA), LOCAL 124 711

Termination - Board finding that employer permitted petitioners' activities and thereby contributed resources which were significant to facilitating termination application - Through its cooperation with and toleration of petitioners' activities, employer also communicated to employees its support for the application - Board finding that employer's contribution, made at an early or formative stage of the application, was significant and influential - Board satisfied that employer's conduct amounting to "initiation" of application within meaning of section 63(16) of the Act and dismissing application

TENAQUIP LIMITED; RE UNIONIZED EMPLOYEES OF TENAQUIP; RE TEAMSTERS LOCAL UNION 419 742

Termination - First Contract Arbitration - Practice and Procedure - Board earlier deciding to hear first contract application first and to defer consideration of termination application - After several days of hearing, employer and union settling first contract application on basis of consent order directing settlement of first collective agreement by arbitration - Board dismissing termination application pursuant to section 43(23) of the Act

EAST SIDE MARIO'S, BIRSSA HOLDINGS INC. C.O.B. AS; RE LYNDIA ANN FALVO; RE UFCW, LOCALS 175/633 574

Unfair Labour Practice - Construction Industry - Damages - Discharge - Remedies - Employer acknowledging violation of the Act but parties disputing appropriate remedy - Board rejecting submission that reinstatement not appropriate - Employer directed to offer grievor position if its employee complement expands to more than 20 employees in 1997 - Board making no order regarding 1998 - Board finding delay in filing complaint not unreasonable and requiring no reduction in damages to which grievor otherwise entitled - Board also finding grievor's attempts at mitigation reasonable - Board deducting workers' compensation benefits received during 5 month period from damages to which grievor otherwise entitled - Board finding that but for employer's wrongful conduct, grievor would have earned sufficient credits to entitle him to employment insurance benefits during two periods of lay-off and Board ordering damages in that respect as well

TORBRIDGE CONSTRUCTION LTD.; RE LIUNA, LOCAL 183 751

Unfair Labour Practice - Discharge - Duty of Fair Representation - Applicant alleging that union violated its duty of fair representation by failing to present certain arguments and evidence

with respect to systemic race discrimination at applicant's discharge grievance arbitration - Application dismissed	
LANUZA, TERESITA; RE ONA; RE THE TORONTO HOSPITAL	615
Unfair Labour Practice - Duty to Bargain in Good Faith - Interim Relief - Remedies - On eve of strike, employer unilaterally transferring seven bargaining unit positions outside of bargaining unit - Union filing unfair labour practice complaint and asking for interim order requiring employer to continue to recognize union as exclusive bargaining agent for the seven individuals holding the disputed positions - Board concluding that balance of harm weighing in favour of union - Application for interim order granted pending disposition or resolution of unfair labour practice complaint	
REGIONAL MUNICIPALITY OF NIAGARA, THE; RE CUPE, LOCAL 1287.....	733
Unfair Labour Practice - Duty to Bargain in Good Faith - Remedies - Strike - Employer's proposal made in January for new collective agreement rejected and employees striking - Union and employees purporting to accept proposal in March - Board satisfied that January proposal had been extinguished by passage of time and in context of long strike - Board finding that employer's rejection of union's repeated overtures to return to bargaining violating its duty to bargain - Board also finding that employer's April proposal for a new collective agreement was designed to invite rejection and was in breach of the Act - Application allowed - Parties directed to return to bargaining forthwith to bargain in good faith and to make every reasonable effort to reach a collective agreement	
PC WORLD, CIRCUIT WORLD CORPORATION, OPERATING AS; RE NATIONAL AUTOMOBILE, AEROSPACE AND AGRICULTURAL IMPLEMENT WORKERS UNION OF CANADA (CAW-CANADA), LOCAL 124	711
Unfair Labour Practice - First Contract Arbitration - Natural Justice - Reconsideration - Board earlier directing settlement of first collective agreement by arbitration - Employer seeking reconsideration of decision on grounds of reasonable apprehension of bias - Employer submitting that apprehension of bias arising because on or about the date of the Board's earlier decision, vice-chair of the panel entered into a retainer agreement with the Canadian Air Line Pilots Association (CALPA) - Employer also relying on fact that vice-chair had discussions with CALPA regarding the retainer prior to date of Board's decision - Board not agreeing that circumstances giving rise to reasonable apprehension of bias - Reconsideration request denied	
DOVER CORPORATION (CANADA) LIMITED INDUSTRIAL DIVISION; RE NATIONAL AUTOMOBILE, AEROSPACE, TRANSPORTATION AND GENERAL WORKERS UNION OF CANADA (CAW-CANADA)	568

3612-96-R Union of Needletrades, Industrial and Textile Employees Ontario District Council, Applicant v. **Black Photo Corporation**, Responding Party v. Group of Employees, Objectors

Employee - Certification - Representation Vote - Board determining that two individuals with sporadic contact with workplace and who perform work on an erratic and irregular basis are not in an employment relationship with employer and not eligible to vote in representation vote

BEFORE: *Janice Johnston*, Vice-Chair.

DECISION OF THE BOARD; July 17, 1997

1. This is an application for certification in which I have already issued a lengthy decision dated June 19, 1997. That decision noted that there remained in dispute between the parties, amongst other issues, the issue as to the eligibility of five individuals to cast ballots in the representation vote held on February 14, 1997. The parties were provided with an opportunity to file additional submissions and documents with respect to these five individuals. It was pointed out in the June 19th decision that a hearing would be scheduled to deal with the disputed individuals if necessary. If it was appropriate to do so, the status issues were to be decided based on the written submissions and documents.

2. The Board is in receipt of submissions dated June 26, 1997 from the employer and submissions dated July 8, 1997 from the union.

3. After reviewing the submissions and accompanying documentation filed by the parties, I am prepared to deal with the issue concerning the employment status of Nicole Lehman and Russel De Souza without a hearing.

4. At the time the vote was directed, the Board determined that the individuals eligible to vote would be:

all individuals who had an employment relationship with the responding party in the voting constituency on February 7, 1997, the certification application filing date, are eligible to vote. Employees having an employment relationship on February 7, 1997, the certification application date, include employees who were not at work on that date, so long as there is a reasonable expectation of their return to employment.

5. The issue currently to be decided is whether Russel De Souza and Nicole Lehman in fact have an employment relationship with the employer and were therefore entitled to vote.

6. In response to the application for certification the employer filed a list of employees in the bargaining unit. This list is primarily made up of full-time and part-time employees who were at work on the application date. The list also included the names of individuals who were not at work on the application date. For these individuals the employer indicated the last day worked, the reason for the absence and the expected date of return. Nicole Lehman and Russel De Souza were not included on this list. It is important to note that the employer did include the names of individuals who worked on an "on-call" basis on this list, but Mr. De Souza and Ms. Lehman were not amongst this group of employees.

7. Ms. Lehman last worked for the company during the week ending October 13, 1996. Mr. De Souza last worked for the company in the pay period ending January 19, 1997. The work history of both individuals indicates sporadic contact with the workplace.

8. In *London District Crippled Children's Treatment Centre*, [1980] OLRB Rep. April 461, the Board laid out some general guidelines and reviewed the jurisprudence concerning the Board's approach to questions concerning employment status and an individual's eligibility to vote. The Board stated:

15. Certification is the primary process in *The Labour Relations Act*. It is the means by which the wishes of employees for representation are transformed into the affirmative right to a union to bargain collectively on their behalf with their employer. Generally, apart from exceptional cases involving extreme unfair labour practices, certification is accomplished by an application of majoritarian principles. A union can be certified by demonstrating support in excess of 55% of the bargaining unit through membership cards. It can also be certified by obtaining a simple majority of the ballots cast in a representation vote. These are the two normal routes to certification under the Act. Both of these procedures require the application of percentages to a defined number of employees. Because employees may continuously come and go through hiring, lay-offs, leaves of absence, quitting and discharge, the Board has had to devise some general rules to apply in order to fix a clear and stable figure of employees in a given bargaining unit for the purposes of an application for certification.

16. There are a number of ready illustrations of those rules. The Board has devised, for example, a "terminal date" as a cut off point for assessing the number of membership cards filed by a union and statements in opposition to certification filed by employees. The Board refers to the date that an application is filed for assessing the number of employees in the bargaining unit. (See *R v. OLRB, Ex parte Hannigan*, [1967] 2 O.R. 469 (C.A.)). And it has developed a "thirty day rule" to determine whether an employee absent on the date of application is to be counted within the bargaining unit for the purposes of the application (*Amplifone Canada Ltd.*, [1967] OLRB Rep. Dec. 840). The Board has also evolved "a seven week rule" as a rule of thumb to assess which employees will be viewed as full-time and which as part-time for the purposes of an application. (*Sydenham District Hospital*, [1967] OLRB Rep. May 135). These are procedural constructs whose application may mean victory or defeat for either party in any particular application. If all of the lines established by these rules were to be redrawn on a case by case basis the certification process would come to a standstill. These established principles are known to the labour relations community and parties coming before the Board can plan on the basis of them. While none of the above rules are entirely inflexible, there is a substantial onus on any party who seeks to have the Board depart from them in a particular case. (*Trenton Memorial Hospital*, [1980] OLRB Rep. Jan. 116)

17. The line which the Board has traditionally drawn respecting the eligibility of employees to vote, namely that the employee be in the bargaining unit both on the date that the vote is ordered (or on the terminal date in a pre-hearing vote or as otherwise agreed by the parties) and on the date the vote is taken, is clear and well known through the Board's published decisions, its practice notes (see Practice Note No. 9, August 1964) and its layman's handbook. While originally the Board merely stated that employees in the bargaining unit would be entitled to vote (see e.g., *The Boarden Co. Ltd.*, (1946), 46 CLLC ¶16,641) it evolved the two-pronged eligibility rule to give greater clarity and certainty to voter's lists, as well as to eliminate the possibility of an employer influencing the outcome of a vote by hiring new employees. The Board's practice and the principles underlying it were well canvassed in *J. McLeod & Sons Ltd.*, [1970] OLRB Rep. Feb. 1316.

• • •

19. The Board's past decisions give considerable guidance in the application of the rules regarding the eligibility of employees to vote in the selection of a bargaining agent. Employees on lay-off without a definite date of recall have been held ineligible to vote (*Rix Athabasca Uranium Mines Limited*, [1961] OLRB Rep. July 127). The Board has found that a person who was an employee in the bargaining unit on the date the vote was ordered and was promoted to acting foreman on the date the vote was taken was ineligible to cast a ballot, notwithstanding that he later returned to the bargaining unit (*Success Display limited*, [1971] OLRB Rep. Oct. 636). An employee who was absent on Workmen's Compensation on the date the vote was ordered and on the date the vote was taken, but who had neither quit nor been terminated was found eligible to vote (*Alex's Plumbing and Heating Limited*, [1970] OLRB Feb. 1321). Where, on the other hand, an employee who was absent due to illness had been treated in all respects as terminated and had no real prospect of

returning to work, the Board concluded that he was not eligible to vote (*Canac Kitchens Ltd.*, [1978] OLRB Rep. Aug. 723).

20. The Board's rule respecting eligibility to vote has sought to strike a balance. On the one hand the Board recognizes the interest of employees with a stake in future collective bargaining having a controlling voice in the choice of a bargaining agent. On the other hand it faces the necessity of establishing a democratic process with some finality in situations where employees are subject to varying degrees of turnover....

21. The Board's voter eligibility rules are not intended and do not purport to achieve a standard of perfect decimal point democracy, assuming such a standard can ever be achieved. The rules seek nothing more than to establish a substantially representative group of employees with a minimum of employment continuity for the purposes of certification....

9. In *Canac Kitchens Limited*, [1978] OLRB Rep. Aug. 723, the Board stated:

4. In determining the eligibility to vote of a person who is not actually at work (in this case on the date agreed upon by the parties) the Board has regard to the continuance of the employment relationship. In this connection, it is well established that persons on indefinite layoff are not permitted to cast ballots in representation proceedings. As was stated in *Custom Aggregates*, [1978] OLRB Rep. March 215, the Board has taken the view that it would be unfair to allow persons whose prospects for continued employment are so uncertain to participate in the selection or rejection of a bargaining agent. Although the absence of a definite recall date is not, by itself, fatal to a person's eligibility to vote, where, as here, there is no evidence to suggest that, on the date agreed upon by the parties, there was an expectation that the employee would be recalled, the Board will conclude that the layoff was for an indefinite period. This conclusion must obtain irrespective of whether the person has in fact been recalled by the date of the vote. One of the purposes of choosing a cut-off date (the date of decision or, as in this case, the date agreed upon by the parties) is to minimize the effect of an attempt to recall or hire employees whose views about representation are known. For the reasons stated, the Board finds that George Nunes was not eligible to vote in the representation vote taken herein.

10. In this case the employment records and other documents filed by both parties make it very clear that Mr. De Souza and Ms. Lehman perform work on an extremely erratic and irregular basis. In their submissions to the Board, both parties referred to them as laid off at the time of the application for certification. They were not even included on the employer's list of employees. Clearly therefore they were on indefinite layoff and no date for their recall had been contemplated. From the date of the application for certification to the date of the vote, neither Ms. Lehman nor Mr. de Souza worked. Although Mr. De Souza has subsequently been recalled to work, given the position taken by the employer on this issue of status, this fact is of no assistance to the determination I must make. Obviously, the employer is in control of when Mr. De Souza actually works and it would be simply too self-serving for the employer to point to the fact that he has worked since the vote was held as indicative of an employment relationship.

11. Accordingly, after carefully considering the issue of the employment status of Ms. Lehman and Mr. De Souza, I am of the view that their tenuous relationship with the employer is insufficient to ground a conclusion that they are employees and as such entitled to cast a ballot. It would be inappropriate to allow individuals with such an uncertain relationship with the employer to participate in the critical decision concerning the representation of these employees by the applicant trade union. Therefore, I direct that their ballots be destroyed and not counted.

12. The applicant has suggested that it may be appropriate to count the ballots cast by:

Wynne Hartviksen;
Shelly Ireland;
Fred Proia;
Patricia McAllister; and
Cathy Orban.

The ballots were originally segregated but the parties subsequently agreed that they should be counted. In the circumstances, I agree with the suggestion of the union that it is appropriate to now count those ballots.

13. It is my view that it will not be possible to deal with the contested managerial exclusions, Mr. Beagle, Ms. Earhart and Mr. O'Halloran, based on the written submissions of the parties. If the Board is to determine this issue, a hearing will be necessary. However, it is possible that a hearing may still yet be put off depending on the number of ballots cast for and/or against the union by the five individuals who have been agreed to as eligible voters. If it is not necessary to count the ballots cast by Mr. Beagle, Ms. Earhart and Mr. O'Halloran to determine the outcome of the vote, I am of the view that the issue of their status should be referred back to the parties for their resolution, if it is necessary to do so. In other words, if after the counting of the ballots the union has won by four or more votes, the votes cast by the three individuals are irrelevant and the parties can deal with the status of Mr. Beagle, Ms. Earhart and Mr. O'Halloran in negotiations. Failing agreement the parties could refer the matter back to the Board. If the union is behind by more than three votes after the ballots are counted, they cannot win the vote and once again the votes of the three individuals are irrelevant.

14. Immediately, prior to the release of this decision, the Board received a request for reconsideration filed by counsel for the objecting employees and one filed by counsel for the employer as well, with regard to the Board's decision dated June 19, 1997. For reasons that will be provided at a later date, these requests for reconsideration are hereby dismissed.

15. This matter is referred to the Manager of Field Services to arrange for the counting of the ballots of the five individuals referred to above.

2308-96-OH Ontario Public Service Employees Union, Bill Walls, Applicant v. The Crown in Right of Ontario (Ministry of the Solicitor General and Correctional Services) and I. Hadden, A. Dvorak, R. Lundy, Responding Parties

Arbitration - Health and Safety - Union representing Crown employee filing complaint alleging unlawful reprisal contrary to Occupational Health and Safety Act (OHSA) and Smoking in the Workplace Act - Employer asserting that Labour Relations Board not having jurisdiction because employee had earlier elected to have subject matter of complaint heard by Grievance Settlement Board - Board not accepting union's submission that section 50(6) of OHSA gives Labour Relations Board exclusive jurisdiction where the complainant is a Crown employee - Board accepting employer's submission regarding effect of employee's election - Application dismissed

BEFORE: *Bram Herlich*, Vice-Chair, and Board Members *J. A. Rundle* and *R. R. Montague*.

DECISION OF THE BOARD; August 29, 1997

1. This is an application filed pursuant to section 96 of the *Labour Relations Act, 1995* in which it is alleged that the responding parties have violated section 50(1) of the *Occupational Health and Safety Act* and section 8(1) of the *Smoking in the Workplace Act* (hereinafter referred to as "OHSA" or "SWA" respectively or collectively as the "Acts").

2. The responding parties have raised a preliminary issue which all of the parties have agreed this Board should dispose of without the need for an oral hearing and on the basis of the written submissions which have been filed.

3. The particulars in support of the application (like those filed in support of the response) are detailed and comprehensive, covering a sequence of events spanning a significant period of time. For the purposes of this decision, however, it is not necessary to review these in great detail.

4. It is sufficient for our present purposes to describe the complaint in an extremely summary fashion. Essentially, it is alleged that Bill Walls (the “applicant”) has suffered an employment related reprisal as result of having acted in compliance/accordance with or having sought the enforcement of the Acts.

5. Again, without entering into the facts in any detail, the applicant relies on an asserted history of past participation in health and safety matters and then outlines his own personal efforts to seek “accommodation from the Employer to avoid second-hand cigarette smoke.” Essentially, it is the responding party employer’s response to those efforts which the applicant seeks to characterize as a reprisal prohibited under the terms of the Acts. The applicant asserts that he has been suspended without pay and on reduced pay for acting in compliance with the Acts. The pleadings further detail the applicant’s efforts to seek accommodation to avoid second-hand cigarette smoke. It is the employer’s response to those efforts, its alleged refusal to accommodate the applicant, which is said to constitute the unlawful reprisal.

6. For its part, the employer denies that its alleged failure to accommodate the applicant constitutes a prohibited reprisal. It asserts that it made considerable efforts to accommodate the applicant and that it has not been influenced in that regard by the applicant’s participation in health and safety issues.

7. Thus, the pleadings disclose that, with respect to the merits of the application, there are a considerable number of legal and factual disputes joined between the parties.

8. The preliminary issue raised by the employer can be described as follows. It is asserted that this Board is without jurisdiction to consider this application because the applicant has elected, under section 50(2) of OHSA, to proceed by way of arbitration, rather than before this Board. Alternatively, even if no such election has been made, the Board is asked to defer to the arbitration process.

9. In support of this position certain factual assertions, which were not disputed by the applicant, are relied upon. In particular the employer asserts the following:

In a grievance filed on November 8, 1995, Walls has also complained that the Employer failed to accommodate his medical condition by failing to find him suitable employment where he would not be exposed to second-hand tobacco smoke, contrary to Article “A” of the Collective Agreement. The remedy sought in that grievance is to be “properly accommodated in a timely fashion and to be reimbursed for all lost wages and benefits, etc.”

10. The employer also advises that (as of March 15, 1997) following a series adjournments at the behest of the union, the grievance was scheduled for arbitration before the Grievance Settlement Board at a hearing set for May 29, 30 and June 5, 1997.

11. The relevant portions of the OHSA are as follows:

50. (1) No employer or person acting on behalf of an employer shall,

- (a) dismiss or threaten to dismiss a worker;
- (b) discipline or suspend or threaten to discipline or suspend a worker;
- (c) impose any penalty upon a worker; or
- (d) intimidate or coerce a worker,

because the worker has acted in compliance with this Act or the regulations or an order made thereunder, has sought the enforcement of this Act or the regulations or has given evidence in a proceeding in respect of the enforcement of this Act or the regulations or in an inquest under the *Coroners Act*.

(2) Where a worker complains that an employer or person acting on behalf of an employer has contravened subsection (1), the worker may either have the matter dealt with by final and binding settlement by arbitration under a collective agreement, if any, or file a complaint with the Ontario Labour Relations Board in which case any regulations governing the practice and procedure of the Board apply with all necessary modifications to the complaint.

(3) The Ontario Labour Relations Board may inquire into any complaint filed under subsection (2), and section 91 of the Labour Relations Act, except subsection (5), applies with all necessary modifications as if such section, except subsection (5), is enacted in and forms part of this Act.

(4) On an inquiry by the Ontario Labour Relations Board into a complaint filed under subsection (2), sections 104, 105, 108, 110 and 111 of the Labour Relations Act apply with all necessary modifications.

(5) On an inquiry by the Ontario Labour Relations Board into a complaint filed under subsection (2), the burden of proof that an employer or person acting on behalf of an employer did not act contrary to subsection (1) lies upon the employer or the person acting on behalf of the employer.

(6) The Ontario Labour Relations Board shall exercise jurisdiction under this section on a complaint by a Crown employee that the Crown has contravened subsection (1).

(7) Where on an inquiry by the Ontario Labour Relations Board into a complaint filed under subsection (2), the Board determines that a worker has been discharged or otherwise disciplined by an employer for cause and the contract of employment or the collective agreement, as the case may be, does not contain a specific penalty for the infraction, the Board may substitute such other penalty for the discharge or discipline as to the Board seems just and reasonable in all the circumstances.

(8) Despite subsection (2), a person who is subject to a rule or code of discipline under the *Police Services Act* shall have his or her complaint in relation to an alleged contravention of subsection (1) dealt with under that Act.

12. Those provisions are mirrored in section 8 of the SWA which provides as follows:

8.-(1) No employer or person acting on behalf of an employer,

- (a) shall dismiss or threaten to dismiss an employee;
- (b) shall discipline or suspend an employee or threaten to do so;
- (c) shall impose a penalty upon an employee; or
- (d) shall intimidate or coerce an employee,

because the employee has acted in accordance with or has sought the enforcement of this Act.

(2) Subsections 50(2) to (8) of the *Occupational Health and Safety Act* apply with necessary modifications when an employee complains that subsection (1) has been contravened.

13. The Board's practice and its interpretation of section 50(2) are established and well known in the labour relations community. The parties referred us to a number of cases in this regard including *Reed Limited, Furniture Division*, [1978] OLRB Rep. Jan. 1; *The Municipality of Metropolitan Toronto*, [1986] OLRB Rep. Feb. 283; *Scarborough General Hospital*, [1988] OLRB Rep. Sept. 981; *Zalev Brothers Limited*, [1989] OLRB Rep. July 810; and *Guelph Transportation Commission*, [1993] OLRB Rep. Sept. 842.

14. For our current purposes perhaps the best summary of the Board's jurisprudence is to be found in the following passage from the *Metro Toronto* case just cited. The Board observed at paragraph 10:

10. It is agreed by the parties, at least with respect to the OHSA issues, that section 24(2) of the OHSA requires an election, i.e., that a worker must choose either to proceed before the Board or the arbitration route. The Board concurs that such an election of forum for redress is clear on the wording of section 24(2); see also *Reed Limited, supra*; *Inco Metals, supra*; *Black & McDonald Ltd.*, [1983] OLRB Rep. Dec. 1971. The Board, however, does not accept the complainant's assertion that the OHSA issue is severable from the grievance so that the Board could deal with that issue while the arbitration panel hears the layoff issue. The "matter" referred to in section 24(2) is the alleged violation of 24(1), namely, that an employer acted to penalize a worker, as set out in sub (a) to sub (d), because the worker complied with or sought enforcement of the OHSA. That issue of improper (or unjust) discipline is the "matter" to be heard at arbitration or before the Board. While the respondent asserts that the undisputed fact that the complainant is no longer an active employee is as a result of layoff, there is no doubt that section 24(1) of the OHSA is integral to the grievance should the grievance be adjudicated in an arbitral forum. The grievance form itself refers to "termination without just cause" rather than improper layoff or some such language. Section 24(1) affords workers a right of protection from penalties for invoking the OHSA; that right is enforceable under the legislation either at arbitration or before the Board. The Board also does not accept the complainant's characterization of the Board as the "expert" forum in respect of alleged violations of section 24(1) of the OHSA. As noted in *Reed Limited, supra*, there can be no general assumptions as to which forum is more suitable. Both are on an equal footing and the statute gives the worker the choice. The Board need not determine precisely whether the remedies available before the Board are broader than at arbitration; rather, the Board regards the remedial authority of either as quite adequate to deal with a violation of section 24(1).

15. Subject to a novel argument advanced by the applicant in response to the preliminary motion, we are satisfied that the Board's comments are equally applicable to the facts of the instant case. Neither are we persuaded that what the applicant describes as "important differences in the issues between the complaint to the Board and the grievance to be heard at arbitration" are significant enough to warrant departing from the settled application of the election requirement.

16. It is true that the ostensible subject matter of the instant complaint is an alleged violation of the Acts, while the ostensible subject matter of the grievance is an alleged violation of those provisions of the collective agreement pertaining to discrimination and an alleged failure of the employer to accommodate the grievor pursuant to its obligations under those provisions. In this regard, the current facts do not present the more usual dichotomy between an OHSA complaint on the one hand and a discipline or just cause grievance on the other. Yet the thrust of the Board's analysis remains applicable. It is the employer's alleged failure to accommodate the applicant which defines the broad parameters of the inquiry either at arbitration or before this Board. The employer's conduct may or not be in violation of the collective agreement - that is presumptively an issue for arbitration. Potentially quite independent of that determination, however, the employer's conduct may or may not constitute a violation of the Acts - but the rights conferred under the Acts are enforceable either at arbitration or before the Board. If there are legal, strategic or other reasons for an applicant to favour one route or the

other in an effort to vindicate those statutory rights, the legislation provides the applicant with the option to choose the preferred forum. Twin proceedings are not available.

17. We have perhaps dwelled on this issue longer than necessary. The applicant did not seriously dispute the Board's general approach to the election obligation. Indeed, it did not dispute (assuming that an election was required in the circumstances of this case), that the applicant had effectively elected to have the matter dealt with by arbitration before the Grievance Settlement Board.

18. However, in a novel and somewhat intriguing argument, the applicant asserts that no requirement to elect arises in the instant case. The argument is grounded in the fact that the applicant is a Crown employee alleging that the Crown has violated the Acts and focuses primarily on the wording of section 50(6) of OHSA which provides:

50. • • •

(6) The Ontario Labour Relations Board shall exercise jurisdiction under this section on a complaint by a Crown employee that the Crown has contravened subsection (1).

19. Thus, the applicant asserts that, contrary to the general model as it applies to non-Crown employees, *only* this Board and *not* a Board of Arbitration (in this case the Grievance Settlement Board) has the jurisdiction to enforce the statutory rights which the applicant seeks to vindicate under the Acts.

20. If the applicant's interpretation of the statute is correct, it would appear to provide a complete answer to the responding party employer's assertion that the application ought to be dismissed, the applicant having elected to have the matter dealt with by final and binding settlement by arbitration. Indeed, at first blush the applicant's interpretation appears attractive. Both Acts (see OHSA section 2 and SWA section 12) contain separate and discrete sections which make the Acts binding upon the Crown. Thus, it would appear that even in the absence of section 50(6) of OHSA, (relevant) alleged violations of the Acts could be the subject matter of complaints before this Board. In other words, section 50(6) is not necessary to confer jurisdiction on this Board. Thus, as the applicant asserts, the purpose and effect of section 50(6) is to confer *exclusive jurisdiction* on this Board and to thus oust the parallel jurisdiction the Grievance Settlement Board would otherwise have to determine whether or not there has been a violation of the Acts.

21. The responding parties dispute this interpretation. They assert that much clearer language would be required to eliminate the right a Crown employee would otherwise have to elect to vindicate his statutory rights via arbitration. It is also asserted that, when one considers the statutory framework of collective bargaining for Crown employees at the time the subsection was first enacted, one can readily deduce that the purpose of the subsection was merely to clarify that it would be this Board and not the Ontario Public Service Labour Relations Tribunal to which a complaint alleging a violation of the Acts could be brought.

22. On balance we prefer the interpretation advanced by the responding parties. While the historical context provided for its preferred interpretation is perhaps apt, we have not lost sight of the fact that, as we have already indicated above, jurisdiction appears to have been conferred on this Board even apart from the provisions of section 50(6). We are more persuaded, however, by the general argument that clearer language is required to arrive at the conclusion advocated by the applicant.

23. In this regard, section 50(8) provides an illustrative example of precisely the kind of explicit language one might expect. For ease of reference we set it out again:

Notwithstanding subsection (2), a person who is subject to a rule or code of discipline under the Police Services Act shall have his or her complaint in relation to an alleged contravention of subsection (1) dealt with under that Act.

[emphasis added]

24. There can be little doubt that this provision removes the jurisdiction of this Board to deal with alleged violations of the Acts pertaining to the class of persons identified therein. It is not so clear that subsection (6) similarly removes the jurisdiction of a board of arbitration to deal with an alleged contravention of subsection (1). Unlike subsection (8), subsection (6) does not explicitly preclude the application of subsection (2) and the availability of the election contemplated therein. Thus, it appears to us that an election is still available even where a Crown employee alleges that the Crown has contravened subsection (1). We also note that the conclusion advocated by the applicant would appear, on its face, to be inconsistent with paragraph 48(12)(j) of the *Labour Relations Act, 1995* which provides:

48. . . .

(12) An arbitrator or the chair of an arbitration board, as the case may be, has power,

. . . .

- (j) to interpret and apply human rights and other employment-related statutes, despite any conflict between those statutes and the terms of the collective agreement.

25. As the Board has indicated in previous cases (including the extract from the *Metro Toronto* case, set out above), there is no presumptively preferred forum for the adjudication of alleged violations of the Acts. Where the worker is otherwise governed by a collective bargaining regime and a collective agreement, the option will be available to the worker (subject, of course, to the role of the bargaining agent with respect to advancing grievances to arbitration) to either go to arbitration or to come before this Board. Subject to the exception noted in subsection 50(8) of OHSA, this option will be available to all workers, including Crown employees, who have access to the grievance/arbitration process.

26. We are thus satisfied that the election contemplated in subsection (2) is available to the applicant in this case even to the extent that he is a Crown employee alleging that the Crown has violated the Acts. The applicant did not dispute that if the election were available to him, that election has been made by virtue of the proceedings already in progress at the Grievance Settlement Board. The applicant, having therefore made his election to have the matter dealt with by the Grievance Settlement Board, cannot advance the instant complaint before this Board.

27. In view of our conclusion in relation to this branch of the preliminary motion, it is not necessary for us to consider or deal with the responding parties' submission that the Board ought to defer to the arbitration process.

28. This application is dismissed.

1593-96-FC; 1594-96-U; 1628-96-U National Automobile, Aerospace, Transportation and General Workers Union of Canada (CAW-Canada), Applicant v. **Dover Corporation (Canada) Limited Industrial Division**, Responding Party; National Automobile, Aerospace, Transportation and General Workers Union of Canada (CAW-Canada) Limited, Applicant v. Dover Corporation (Canada) Limited, Industrial Division, Burns International Security Services Limited and Fred Collins, Responding Parties

First Contract Arbitration - Natural Justice - Reconsideration - Unfair Labour Practice - Board earlier directing settlement of first collective agreement by arbitration - Employer seeking reconsideration of decision on grounds of reasonable apprehension of bias - Employer submitting that apprehension of bias arising because on or about the date of the Board's earlier decision, vice-chair of the panel entered into a retainer agreement with the Canadian Air Line Pilots Association (CALPA) - Employer also relying on fact that vice-chair had discussions with CALPA regarding the retainer prior to date of Board's decision - Board not agreeing that circumstances giving rise to reasonable apprehension of bias - Reconsideration request denied

BEFORE: *Laura Trachuk*, Vice-Chair, and Board Members *J. A. Ronson* and *H. Peacock*.

DECISION OF VICE-CHAIR LAURA TRACHUK AND BOARD MEMBER H. PEACOCK;
July 24, 1997

1. This is a request for reconsideration of a decision of the Board (differently constituted) dated November 22, 1996.
2. The history of this matter that is relevant to this request for reconsideration is as follows. On September 17, 1996 a panel of the Ontario Labour Relations Board comprised of Vice-Chair R. Stoykewych and Board Members R. M. Sloan and P. V. Grasso commenced a hearing with respect to the above three applications. One of the applications (1593-96-FC) is a request that a first contract be determined by arbitration. The other file (1594-96-U) is an application under section 96 of the Act alleging various unfair labour practices.
3. The hearing concluded on October 31, 1996 and a decision of a majority of the panel (Board Member Sloan dissenting) was rendered on November 22, 1996. Board Member Sloan's dissent and an opinion by Board Member Grasso concurring with the November 22, 1996 decision were issued on January 27, 1997.
4. The majority's decision was relatively brief and directed that the first contract be settled by arbitration. The application under section 96 of the Act was dismissed. As a result of this decision, a strike which had been in effect for approximately six months was brought to an end.
5. Vice-Chair Stoykewych's full-time appointment to the Board was terminated on October 2, 1996 and replaced with a part-time appointment specifically for the purpose of finishing any cases with which he was seized.
6. Between October 12 and November 22, 1996 the Vice-Chair engaged in discussions with the Canadian Air Line Pilots Association (CALPA) with respect to being retained as counsel by that organization. CALPA is a trade union which represents pilots and operates solely in the federal sector. On or about November 22, 1996 the Vice-Chair entered an agreement with CALPA.

7. The Vice-Chair did not advise the parties to this matter of the change in his appointment. On December 4, 1996 the responding party (referred to as the “company”) learned that the Vice-Chair was working for CALPA. On January 7, 1997 the company filed this request for reconsideration on the basis that there was a reasonable apprehension that the Vice-Chair was biased when he rendered his decision.

8. By way of correspondence dated February 25, 1997 to the Registrar of the Board, Vice-Chair Stoykewych declined to determine the request for reconsideration. In that correspondence, the Vice-Chair set out a number of facts, including those outlined above, upon which the parties have agreed to rely in this request for reconsideration.

9. The Vice-Chair and two other Vice-Chairs whose full-time appointments to the Board were terminated at the same time, commenced litigation with respect to the cancellation of their Orders-In-Council. In a decision dated February 11, 1997 the Divisional Court found that the revocation of the Orders-In-Council was invalid.

10. Correspondence was subsequently received from the parties with respect to this request for reconsideration. On the basis of that correspondence, it appeared that the facts relevant to this request for reconsideration were not in dispute. The Board therefore directed the parties to make their submissions with respect to this request for reconsideration in writing. Those submissions have now been received and neither party has requested a further oral hearing.

11. In its submissions, the company has included further “factual” material upon which it appears to be relying. This material is apparently part of an affidavit filed by the Vice-Chair with the Divisional Court and part of a transcript of a cross-examination on that affidavit.

Submissions of the Parties

12. The company argued that this is an appropriate case for reconsideration as it did not know, and could not reasonably be expected to know, the facts giving rise to its claim of a reasonable apprehension of bias prior to the Board’s decision in November 22, 1996 being rendered. The essence of its argument that there is a reasonable apprehension that the Vice-Chair was biased in making his November 22 decision is that he was in discussion with a trade union with respect to future employment during the hearing and while making the decision. The company also notes that it is possible that the Vice-Chair entered his agreement with CALPA before rendering his November 22 decision as his correspondence indicates he entered that agreement “on or about” November 22. The company claims that there is no question that the Vice-Chair had entered his agreement with CALPA before the Board was *functus officio* as the Board Member did not issue his dissent until the end of January. The company asserts that there is a reasonable apprehension that the Vice-Chair would be biased in these circumstances. The company also claims that as the Vice-Chair did not agree with the termination of his “employment” during these proceedings, there is a reasonable apprehension that he would be biased against all employers. The company argues that its claim that there is a reasonable apprehension of bias is supported by the short reasons provided for the Board’s November 22 decision. The company stressed in its reply, however, that it was not alleging real bias on the part of the Vice-Chair.

13. The company also claims, based on the partial affidavit included in its materials, that there is a reasonable apprehension of bias because the Vice-Chair asserted in that document that one of the reasons he was advised that his full-time Order-in-Council was being revoked was that the government perceived that there were too many Vice-Chairs with a background in representing unions at the Board.

14. The company relied upon the following decisions: *Edwards, A Unit of General Signal*, [1996] OLRB Rep. July/August 632; *Regina v. Ontario Labour Relations Board*; *Ex Parte Hall* [1963]

2 O.R. 239; *Committee For Justice and Liberty et. al v. National Energy Board* 68 D.L.R. (3d) 716; *Re Consolidated-Bathurst Packaging Ltd. and International Woodworkers of America, Local 2-69 et al.* 68 D.L.R. (4th) 524; *Newfoundland Telephone Co. v. Newfoundland (Board of Commissioners of Public Utilities)* [1992] 1 S.C.R. 623; *Careful Hand Laundry and Dry Cleaners Limited*, [1988] OLRB Rep. Dec. 1205; *The Ontario Realty Corporation (ORC)*, [1996] OLRB Rep. November/December 998; *Ottawa General Hospital* 41 L.A.C. (4th) 344; *Calgary General Hosp., etc.* 29 ALTA L.R. (2d) 3; *Re Miracle Food Mart, Steinberg Inc.* 18 L.A.C. (4th) 257.

15. The applicant (referred to as the union) denies that there is a reasonable apprehension that the Vice-Chair was biased when he rendered his decision in November, 1996. It argues that the issue of whether there is such a reasonable apprehension of bias must be considered in the context of the particular tribunal. In this case, most Chairs and Vice-Chairs of the Ontario Labour Relations Board have practised labour law, and as is common in that practice, have represented either unions or employers, but not both. The union asserts that no informed member of the community would be surprised to learn that a Chair or Vice-Chair would seek to return to a labour law practice. It notes that that has indeed occurred on a number of occasions in the past. It argues that the labour relations community accepts adjudicators with such backgrounds and relies upon their oaths of office, the Rules of Professional Conduct and their personal integrity. It also notes that trade unions are not a monolithic group. CALPA has no formal ties with the applicant, and unlike the applicant, is not an affiliate of the Canadian Labour Congress, the Ontario Federation of Labour, the Metro Labour Council or any like trade union body. (These are also facts provided for the first time through the parties' submissions.) It notes that CALPA is active only in the federal sector and has no status as a trade union under Ontario legislation. There is no nexus between Mr. Stoykewych's retainer and the parties, the tribunal, or the subject matter of the dispute.

16. The union also argued that the company's counsel became aware of the Vice-Chair's change in status during the course of the hearing and did not raise any objection at the time. According to the union, the company has therefore waived its ability to make this bias objection. The union denies that the Vice-Chair should have awaited the dissent before accepting the retainer with CALPA as it is quite possible it would not be issued. Under the Board's system of tripartite decision-making, the Vice-Chair had made his decision when he released it, as it indicates that the Board Member's dissent would follow. The union also asserts that it is relevant that the Vice-Chair's relationship with CALPA is a retainer, not an employee relationship. It denies that the Vice-Chair's own litigation gives rise to an apprehension of bias against employers in general.

17. The union also argues that the request for reconsideration is untimely, as even by its own assertion, the company knew the relevant facts with respect to the Vice-Chair's situation on December 4, yet waited until January 7, 1997 to make its request. In the meantime, the parties proceeded to hearing on a back-to-work protocol (a fact raised for the first time in the submissions). It denies that the limited reasons provided by the Board are any indication that it was biased in making its determination.

18. In reply, counsel for the company denied that he was aware of the Vice-Chair's change in status during the hearing. The company also denies the other submissions made by the union and it claims that the Vice-Chair may conceivably rely upon his own decision in a future case involving CALPA and that that is an example of why there is a reasonable apprehension of bias.

Decision of the Majority

19. The Board accepts that the facts upon which the company relies in this application for reconsideration did not come to its attention and could not have been expected to come to its attention through due diligence prior to the Board's decision of November 22, 1996. The Board is therefore prepared to consider the company's motion that there is a reasonable apprehension that the November

22, 1996 panel was biased. However, having carefully considered the submissions of the parties, the majority has concluded that there is no merit to the company's claim of an apprehension of bias.

20. The Board is subject to a high standard when it comes to matters of bias or its perception. In the *Ontario Realty Corporation* (ORC), (*supra*, at paragraphs 40-44), the Board explained this high standard as follows:

40. As the respondents point out, the Board is charged with the responsibility of supervising labour relations in the province. This requires the Board to make decisions with significant consequences for commercial, individual and collective rights. The Board's decisions are protected by a privative clause. Judicial deference to the Board's particular expertise is well entrenched in the jurisprudence. For most purposes, the Board's decision of an issue is the final one. These factors alone in my view would require a strict standard against which to measure perceptions of bias.

41. There is also a very real sense in which the nature of the Board's subject matter demands that parties are able to hold the Board to a high standard of neutrality. The statutory scheme set out in the Act assumes that, on one level, the interests of management and labour are explicitly in conflict. This assumption lies at the heart of notions of inclusion or exclusion, whether a person is an employee for purposes of the Act, or alternatively, excluded from collective bargaining because his or her interests lie with management. The scheme of the Act anticipates that these parties whose interests are in conflict, will live with each other in long term relationships.

42. The legislation provides necessarily for a neutral third party in the person of the Board or, in some cases, as arbitrators. The neutral's job is to enforce and supervise the long term "management and labour" relationships that are inherently characterized by a degree of unavoidable conflict. The job cannot be done if one or both parties apprehend that the neutral is partial, or "interested" in the way in which the relationship is managed or supervised. Without the parties' trust in its "lack of bias", the neutral will fail in its responsibilities. If this happens, the statutory scheme will not work. Parties may in this case, look beyond the statute for other means by which to influence and pressure each other.

43. On this analysis, the advantages of holding the Board to a high standard, as the respondents suggest, are obvious. What of the disadvantages? The immediately apparent one is that the application of this standard requires a declaration of potential conflicts between adjudicators and parties on a broad scale. The circle of proscribed knowledge or relationships, is drawn larger rather than smaller. It is unlikely, however, that this apparent disadvantage has in the past, or will in the future, prevent the Board from doing its job.

44. Having regard to these considerations, I accept the respondents' submission that, on issues of bias and its perception, the Board should be held to a high standard.

21. The Board therefore acknowledges the necessity that there be no reasonable apprehension of bias in its decision making. However, the circumstances surrounding the Board's determination of this application do not violate that standard.

22. The Vice-Chair completed the hearing in this matter and issued the November 22 decision while he was properly appointed by an Order-in-Council and subject to the same oath of office he was subject to when he commenced the hearing. His Order-in-Council specifically directed that he finish the matters upon which he was seized. The Lieutenant-Governor-in-Council therefore appears to have had no concerns with his ability to continue to adjudicate cases. Nevertheless, the company claims that there was a reasonable apprehension that the Vice-Chair was biased when he concluded the hearing and the majority rendered its decision because he had engaged in discussions with, or had entered into a remunerative relationship with, that trade union before he issued his decision. Alternatively, it claims there was a reasonable apprehension of bias because he had entered into an employment or retainer relationship with a trade union before the Board Member had issued his dissent. The majority does not agree that "a person who is informed about the circumstances surrounding the event giving rise to the allegation could have a reasonable apprehension that the adjudicator will not or will not be able to

determine the matters in issue in a manner consistent with providing a fair and impartial hearing.” (see *Careful Hand Laundry* (*supra*, at pg. 9). Or, as the Supreme Court of Canada has articulated it, the facts do not “give rise to a reasonable apprehension, which reasonably well-informed persons could properly have, of a biased appraisal and judgment of the issues to be determined...” (see *National Energy Board* (*supra*, at pg. 733).

23. The organization with which the Vice-Chair was in discussion, and with which he ultimately entered into a remunerative relationship, has no relationship to any party in this proceeding. It has never even been a party to any proceeding of this Board because it operates strictly in the federal sector. These facts are significantly different than those in any of the decisions referred to by the company. In all of those decisions, the adjudicator in question was identified in some way with one of the parties or with a particular issue to be decided upon. In *Regina v. Ontario Labour Relations Board; Ex parte Hall* (*supra*), the Board member in question was actually the president of an organization of trade unions of which one of the parties was a member. He had also taken an oath of office upon obtaining that position which required him to promote the goals of that organization. It is noteworthy that the court in that decision did not seem to be concerned by a situation in which a Board member was a member of any trade union (see page 246). In *National Energy Board* (*supra*), the apprehension of bias arose because one of the members of the Commission had been involved in a study which gave rise to one of the competing applications before it. The Commission member therefore had been associated with an issue he had to decide, as well as being associated with the equivalent of a “party” (see page 730). *Re Consolidated Bathurst* does not deal with a question of an apprehension of bias and is presumably included for the principle that the Board is subject to the principles of natural justice, a claim about which there can be no dispute. In *Newfoundland Telephone Company* (*supra*), the Board Member actually spoke publicly about an issue that was before the Board to decide. In doing so, he clearly expressed a view before the Board had made its decision. There is absolutely no similarity between those facts and the facts of this case. In *Careful Hand Laundry* (*supra*), one of the parties brought a motion to have the Vice-Chair hearing the matter disqualified because of a reasonable apprehension of bias because she had commented on the nature of the evidence that the parties would have to deal with in order to succeed with their case. The Board did not find that there was a reasonable apprehension of bias, and in any case there are no allegations that anything similar occurred in this case. As noted, the *Ontario Realty Corporation (ORC)* (*supra*) decision stands for the proposition that the Board is subject to a high standard with respect to questions of bias and apprehension of bias. That is a principal about which there can be no doubt. In *Ottawa General Hospital* (*supra*), the arbitrator withdrew from the hearing because his wife was an employee of the party employer. In *Calgary General Hospital* (*supra*), the Board Member was an employee of the parent union of one of the parties. Again it is not alleged that the Vice-Chair in this case has any association with either of the parties. Finally, in *Re Miracle Food Mart* (*supra*), the arbitrator withdrew because his law partners were involved in litigating the same issue before the courts as gave rise to the grievance before him. His law partners were taking the same position as the employer in the arbitration. It is noteworthy that no one suggested that the arbitrator was biased merely because he was a partner in a law firm which represents employers in labour and other matters.

24. The facts of this situation do not approximate the facts of any of the above cases and do not give rise to a reasonable apprehension of bias. While there is no question that Vice-Chairs of the Ontario Labour Relations Board are subject to a high standard of neutrality and the appearance of neutrality, the Board is not a court and that “appearance” must reflect the context in which the adjudication of labour relations matters takes place in this Province. The company is urging the Board to find essentially that because the Ontario labour relations bar tends to represent either trade unions or employers, and the Vice-Chair was in discussions with, or had accepted a position with, a trade union prior to issuing his decision, there is a reasonable apprehension that he would give a biased decision in this matter. There is simply no basis to find that the Vice-Chair was tainted by any such “bias in the air”. He had no

association with these parties or the issue upon which he was deciding. The Ontario Labour Relations Board is an expert tribunal. It acquires its expertise because its Vice-Chairs and Board Members have labour relations experience. That expertise is not synonymous with bias. It has always been understood that Vice-Chairs adjudicating at the Board under an oath of office are applying their experience in a neutral fashion. In *Dylex Ltd. v. Amalgamated Clothing and Textile Workers* (1977) 77 CLLC 296, an allegation of a reasonable apprehension of bias was raised because the Vice-Chair had had a somewhat recent association with one of the parties appearing before him. The Court stated:

[Bias not established]

In looking at the cumulative effect of the factors relied upon by counsel for the employer there are certain other factors which have to be weighed in the balance. They are as follows. The vice-chairman had nothing to do with any aspect of the present proceedings, as part of his association with the law firm or otherwise, and neither did the law firm itself during the currency of his association with it. Over a year had elapsed since he had anything to do with the union, or more correctly, one of its predecessors. Almost a year had elapsed since his connection with the law firm terminated.

Further, on a more general plane, the nature and functions of the Board itself have to be regarded. The fact that a judge in similar circumstances would not, I would think, have heard the case is not determinative. (In saying this I am not expressing an opinion on minimum *legal* standards.) We can take judicial notice, if it is not apparent from *The Labour Relations Act* itself, that members of the Labour Relations Board and in particular the chairmen of panels will have had experience and expertise in the law and labour relations. The Government of Ontario looks to people with such a background in making appointments. Most, if not all of those appointed, are bound to have some prior association with parties coming before the Board. In this connection the remarks of Mr. Justice Hyde in *Regina v. Picard et al, Ex parte International Longshoremen* (1968), 65 D.L.R. (2d) 658 at p. 661 [68 CLLC ¶14,124] are apposite:

The only basis for any apprehension of bias submitted by appellant is that Commissioner Picard had been consulted more than a year before his appointment as Commissioner by Aluminum Limited which is a company which controls one of the parties before the Commission, namely, the respondent Saguenay Shipping Ltd. ... I am quite unable to anticipate a biased approach by Commissioner Picard on the ground raised by the appellant. Professional persons are called upon to serve in quasi-judicial and administrative posts in many fields and if Governments were to exclude candidates on such ground, they would find themselves deprived of the services of most professionals with any experience in the matters in respect of which their services are sought.

Such people, having taken an oath of office (*The Labour Relations Act*, s. 91(18)) and, at least in the case of trained lawyers, being conscious of the necessity of ridding their minds of extraneous matters, it is not unreasonable to assume that they, in exercising their jurisdiction, will act in good faith. ...

25. In this case, the fact that the Vice-Chair had discussions with a trade union or accepted a job with a trade union at or about the same time as the majority decision was issued does not mean that he was suddenly incapable of applying his expertise in a neutral fashion. The mere fact that the adjudicator was intending to represent a trade union with no relationship to the dispute in other matters, in the future, in another jurisdiction, cannot be perceived as diminishing his ability to adjudicate this matter in a neutral manner as directed by the Lieutenant Governor in Council.

26. The company also argues that the fact that the Vice-Chair had commenced his relationship with CALPA before the dissent was issued is an indication of an apprehension of bias or a failure of natural justice. It is not uncommon for a majority decision to be issued prior to a dissent if there is some expectation that the dissent may not be issued for some time and time is of the essence. In this case the Act requires the Board to issue decisions with respect to first contract applications expeditiously. It was therefore not only appropriate but necessary for the majority to issue its decision. Furthermore, the

limited reasons provided for the majority's decision in this matter are not reflective of any bias but of the time frame in which such decisions must be rendered by statute.

27. The company also claims that the Vice-Chair's account of what he was told about the circumstances of the change in his Order-in-Council which is included in the portion of his affidavit in the materials gives rise to a reasonable apprehension of bias. The majority does not find anything in this hearsay "evidence" which can support such a claim.

28. For all of the above reasons, the majority declines to grant the request for reconsideration of the Board's decision of November 22, 1996.

DECISION OF BOARD MEMBER JAMES A. RONSON; July 24, 1997

1. It is my decision that we should set this matter down for an open, public hearing. I am obliged to Mr. J. Richard Finlay, whose opinion piece in *The Financial Post* of July 16, 1997, has been of assistance. Mr. Finlay is chairman of the Centre for Corporate and Public Governance, and he opined, in part:

"Why do good people so often find themselves ensnared in situations that cause such personal and professional distress? Several reasons come to mind.

First, perception and reality are often confused. If there is no real conflict of interest, there is no real problem - right? Wrong! In matters of public ethics, which is just about anything in which the public has a stake, perceptions are everything. The idea is not new. Like Caesar's wife, who had to be above suspicion, and justice, which must be seen to be done, there must be nothing that gives rise to even the appearance of a conflict of interest when the public's business is involved."

2. The procedural path chosen by my colleagues in arriving at their decision allows the perception that this Board is protecting one of its own from the rigours of cross-questioning and that it does not wish to have one of its friends dragged through the mud. I think we should never consciously allow the Board to find itself in such a situation.

1994-96-R Lynda Ann Falvo, Applicant v. United Food & Commercial Workers International Union, Locals 175/633, Responding Parties v. Birssa Holdings Inc. c.o.b. East Side Mario's, Intervenor

First Contract Arbitration - Practice and Procedure - Termination - Board earlier deciding to hear first contract application first and to defer consideration of termination application - After several days of hearing, employer and union settling first contract application on basis of consent order directing settlement of first collective agreement by arbitration - Board dismissing termination application pursuant to section 43(23) of the Act

BEFORE: *S. Liang*, Vice-Chair, and Board Members *J. A. Rundle* and *R. R. Montague*.

DECISION OF THE BOARD; August 22, 1997

1. This is an application for termination of bargaining rights. By decision dated June 11, 1997, the Board requested the parties' submissions on why this application should not be dismissed, having regard to the provisions of section 43(23) of the *Labour Relations Act, 1995*, which states:

43. (23) Despite subsection (2), where an application under subsection (1) has been filed with the Board and a final decision on the application has not been issued by it and there has also been filed with the Board, either or both,

- (a) an application for a declaration that the trade union no longer represents the employees in the bargaining unit; and
- (b) an application for certification by another trade union as bargaining agent for employees in the bargaining unit,

the Board shall consider the applications in the order that it considers appropriate and if it grants one of the applications, it shall dismiss any other application described in this section that remains unconsidered.

2. Section 43(1) allows a union or employer to apply for a direction that a first collective agreement be settled by arbitration.

3. For ease of reference, the parties to this application will be referred to as the “petitioner”, the “employer” and the “union”. The Board is in receipt of letters from counsel for the applicant and counsel for the employer in response to its decision of June 11. In both, the Board is urged to allow the termination application to proceed despite an order of the Board also dated June 11 directing the settlement of a first collective agreement by arbitration. For the following reasons this application is dismissed.

4. To briefly summarize the factual background, on May 14, 1994, as part of a settlement of an application for certification, the employer agreed to voluntarily recognize the union as the bargaining agent for a unit of its employees. A conciliation officer was appointed at the request of the union on June 13, 1994. On August 23, 1995, a no-Board report was issued by the Ministry of Labour. On September 28, 1995, the union applied for first contract arbitration pursuant to the provisions of the *Labour Relations Act*, R.S.O.1990, c.L-2. Upon the repeal of that Act, the first contract arbitration proceedings were terminated, and the parties resumed collective bargaining. On September 26, 1996, a second application for first contract arbitration was made (Board File No.1910-96-FC), this time under the provisions of the *Labour Relations Act, 1995*.

5. Upon receipt of the application for first contract arbitration, the Board scheduled the matter for hearing commencing October 21, 1996, by Notice of Hearing dated October 8. On October 9, the Board received this application for termination of bargaining rights. In its response to the termination application, the union, among other things, submitted that the Board ought to postpone any representation vote in connection with that application until it had considered the application for first contract arbitration. The union also indicated that it intended to rely on section 63(16) of the Act, which provides:

63. (16) Despite subsections (5) and (14), the Board may dismiss the application if the Board is satisfied that the employer or a person acting on behalf of the employer initiated the application or engaged in threats, coercion or intimidation in connection with the application.

6. By decision dated October 16, 1996, the Board determined that it would not hold a representation vote at that stage. The Board stated:

- 1. This is an application for termination of the union’s bargaining rights.
- 2. The union responds by making serious allegations under section 63(16) of the *Labour Relations Act, 1995* of employer initiation of the termination application.
- 3. There is pending before the Board, due for hearing on October 21, 1996, an application by the union for first contract arbitration under section 43 of the Act in Board file No. 1910-96-FC.

4. The Board has resolved that a representation vote in respect of the termination application will not be held at this stage, given the matters referred to in paragraphs 2 and 3 above. This application will be listed for hearing on October 21, 1996, with Board file No. 1910-96-FC. The panel hearing the applications may determine the matters referred in subsection 43(23) of the Act and whether and when, or not, to order the representation vote sought by the applicant.

7. On October 21, the date set for hearing in both matters, all parties to both applications agreed to adjourn the hearing to January 13, 1997. By letter dated October 30, counsel for the petitioner wrote to the Board requesting that the Board hold a representation vote, and requesting a change of venue.

8. After receiving the submissions of the parties in response to this request, the Board (by a majority) issued a decision dated December 20, stating:

4. Having received and reviewed the submissions of counsel on these issues, the majority of this panel, with Board Member J. Rundle dissenting, declines the request to have the representation vote held prior to the start of the hearing. The majority finds no reason to depart from the decision made by the Board on October 16. It appears that the preliminary issue which the Board must determine at the start of the hearings is how exercise its discretion under section 43(23) of the Act, which relates to the order in which it should consider these applications. It may be that the Board will decide to hear the first contract application first. It may be that the Board will decide to hear the termination application first. Or, the Board may join the two matters for hearing. Its determination on this issue will also bear on the question of whether to order a representation vote at the present time. The majority of this panel therefore finds it appropriate to defer the question of the holding of a representation vote to be dealt with at the hearing, as part of its decision under section 43(23).

5. With respect to the request for a change of venue, the Board recognizes the hardship that it causes parties of lesser means to have to travel to Toronto to attend hearings. If it were possible, the Board would conduct its hearings wherever it is most convenient to the parties appearing before it. However, it is not within this panel's ability to grant the request. Budgetary constraints have required administrative decisions to be made on the issue of hearing venue. It is the understanding of this panel that at the moment, the Board is not scheduling any new matters to be heard outside of Toronto.

6. Accordingly, the hearing will proceed in Toronto as previously scheduled.

9. In response to that decision, counsel for the petitioner made a request dated January 7, 1997 for a teleconference between the parties to the two applications and a panel of the Board, in order to renew its request for a change of venue.

10. Upon a further review of the circumstances, the Board issued the following endorsement, on January 9:

2. In view of the burden tha[t] it places on the individual applicant in the termination application to appear in Toronto for this hearing; and of the *possibility* that under section 43(23) the Board may decide to hear and dispose of the application for a first contract direction before considering the termination application; and the *possibility* in that event that the applicant in the termination application may not feel the need to attend the hearings into the first contract case, the Board finds it appropriate to direct a teleconference for the purpose of hearing the parties' arguments with respect to this issue.

3. The Board will therefore convene a teleconference to take place Friday, January 10, 1997, at 1:00 p.m. for the purpose of receiving the parties' arguments as to the order in which it should consider these applications, having regard to section 43(23) of the Act.

11. The teleconference was held, and the parties made submissions on the issue of the order in which the Board ought to consider these two applications. The petitioner and the employer submitted

that the Board ought to consider the termination application first, and the union submitted that the Board ought to consider the first contract application first. After hearing the submissions of the parties, on January 13, the Board issued the following endorsement:

The majority of the panel has determined to consider the application for a first contract direction before turning to a consideration of the termination application. Board Member J. A. Rundle dissents and would have heard both matters together.

12. In arriving at its determination, the majority considered the competing considerations in these matters, both procedural and substantive. The Board has indicated in prior decisions that the Act does not demonstrate a legislative intent to give primacy to either petitioners in a termination application, or a union bringing a first contract application (see, for instance, *Venture Industries Canada Ltd.*, [1990] OLRB Rep. May 625 and *Forth William Clinic*, [1996] OLRB Rep. Nov./Dec. 942. Both types of applications involve substantive rights. The Act reflects an intent that both be dealt with expeditiously, by providing for speedy votes in a termination application, unless the Board orders otherwise, and by providing for speedy hearings and determinations in a first contract application. On our review of the materials in both applications and the submissions of the parties, the Board likewise saw no reason on the facts of this case, to prefer the substantive rights of the petitioners over those of the union. The petitioner raises by her application a question about the continuing support for this union amongst the members of the bargaining unit. The application was made during a time period within which the Act allows employees to test the continuing support for their bargaining agent, and indeed, some time had lapsed since the union had first become entitled to represent these employees. On the other hand, the application made by the union raises a question about whether the conduct of the employer has caused the failure to arrive at a first collective agreement. Its application raises implicitly and explicitly the issue of whether the employer's conduct contributed to the filing of the termination application. All of these issues are important ones, and the majority of the panel was unable to find that the issues raised by the petitioners were *more* important, or should trump the ability of the union to litigate the issues raised in its application.

13. Where a termination application was filed during the course of the hearing on the first contract application, the Board has generally decided to give primacy to the first contract application, in recognition of the parties' legitimate expectation of resolution. The parties' expectations in this regard were of minimal assistance on the facts of this case, since the first contract application had not proceeded in any meaningful fashion by the time the termination application was filed.

14. Ultimately, the majority of this panel of the Board saw no compelling reason on the facts of this case to prefer one application over the other. Ultimately, it determined that it should simply proceed with the application which came before the Board first, the first contract application.

15. Because of this determination, the majority saw no useful reason to order that the two applications be heard together. Where the Board has heard a first contract application and termination application together, it has deferred to the end of the hearing its decision as to which should be resolved first.

16. Finally, also because of this determination, the Board saw no reason to order a representation vote in the termination application at this stage. Section 43(23) contemplates that a termination application may be deferred pending the resolution of a first contract application. The presumption of speedy votes is one element of the statutory policy that representation matters be dealt with quickly by the Board; where the representation issue has been deferred because of another statutory policy, the presumption of a speedy vote loses its force. The Board does not need to decide whether it is *precluded* from ordering a vote even while a termination application has been deferred under section 43(23) of the Act; we saw no compelling reasons in this case to proceed with one.

17. The hearings into the first contract application commenced on January 14, 1997. After about six days of hearing, the Board was advised by counsel for the employer that the employer and the union had resolved the issues in the application for first contract direction and accordingly were agreeing to adjourn hearing dates before the Board. By letter dated May 30, 1997, counsel for the employer forwarded to the Board the parties' consent to a Board order directing the settlement of a first collective agreement by arbitration, as well as a Memorandum of Agreement between the parties to that litigation. Pursuant to the consent of the parties, the Board issued a decision dated June 11, 1997 directing the settlement of a first collective agreement between the parties by arbitration.

18. It was in the above context that the Board issued its decision in the termination application on June 11, leading to the submissions currently before it.

19. We have considered the submissions in that correspondence, and despite the vigorous assertions to the contrary, we can find no basis to depart from the clear and unambiguous language of section 43(23). Section 43(23) means exactly what it says: on the facts of this case, where the Board has determined to consider the application for a first contract direction prior to a consideration of the termination application, and the application for a first contract direction is granted, the termination application shall be dismissed.

20. There is nothing in the language of section 43(23) which suggests that the Board can deviate from its clear meaning when the application is granted on the consent of the parties, instead of after a hearing on the merits.

21. Counsel for the petitioner submits that if the Board decides not to proceed with her termination application, the Board will be disregarding the freedom of choice of the employees provided for in the *Labour Relations Act, 1995* as well as violating the employees' fundamental democratic rights as provided for under the *Charter of Rights and Freedoms*.

22. There is nothing insidious about the fact that to the extent employees have the freedom to choose to belong or not to belong to a trade union, there is a statutory and procedural framework which governs how and when that choice is to be exercised. There are time limits, formal procedures, evidentiary prerequisites and other conditions governing the exercise of that choice, all of which reflect a balance of various substantive and procedural rights advanced by the Act. There is nothing insidious about the fact that the Act gives the Board the power to decide which of two matters that come before it should be determined first, that the Board has exercised this power taking into account relevant principles, or about the fact that the statute provides that a disposition of one matter will result in the other being terminated. The Board is unable to discern any basis for the assertion that in exercising its powers under the statute in this case, it has denied democratic rights under the *Charter of Rights and Freedoms*.

23. Accordingly, and pursuant to section 43(23) of the Act, this matter is hereby dismissed.

1830-96-R; 2042-96-U International Brotherhood of Electrical Workers, Local 353, Applicant v. JAK Electrical Contractors Limited, Responding Party

Certification - Certification Where Act Contravened - Construction Industry - Evidence - Intimidation and Coercion - Practice and Procedure - Remedies - Representation Vote - Union alleging that employer making certain threats and that union should be certified under

section 11 of the Act - Employer asking Board to entertain subjective testimony of employees regarding whether they felt able to vote freely and whether their own votes reflected their true wishes regarding union representation - Board ruling that proffered evidence not relevant and inadmissible - Board finding that employer's sharing of its "economic analysis" with its employees was not a legitimate exercise of free speech, but designed to intimidate and coerce employees - Board finding that four statutory pre-conditions to certification under section 11 of the Act met - Certificates issuing

BEFORE: *Lee Shouldice*, Vice-Chair.

APPEARANCES: *Elizabeth Mitchell* and *Barry Stevens* for the applicant; *John Barrack* and *Andrew Kimens* for the responding party.

DECISION OF THE BOARD; August 26, 1997

I. Introduction

1. These files are, first, an application for certification in the construction industry, and, second, an unfair labour practice complaint. These proceedings came on for hearing before me on December 2, 1996, and hearings continued on December 3 and 4, 1996, January 13, 15, 16, 23, February 6, 7, 10, 17, 26 and 28, 1997.

2. The applicant, the International Brotherhood of Electrical Workers, Local 353 (hereinafter referred to as "Local 353" or "the union") filed the above-referenced application for certification with the Board on September 24, 1996. By decision dated October 1, 1996, the Board (differently constituted) determined a bargaining unit appropriate for collective bargaining and directed that a representation vote be taken of employees in the bargaining unit on October 3, 1996. As directed, on October 3, 1996 a representation vote was taken of employees in the bargaining unit.

3. On the day prior to the vote, October 2, 1996, the union forwarded to the Board, through its counsel, correspondence alleging that the responding party, JAK Electrical Contractors Limited (hereinafter referred to as "the company" or "the employer"), had committed unfair labour practices prior to the representation vote. Furthermore, the union stated in this correspondence that it would be relying upon section 11 of the *Labour Relations Act, 1995* (hereinafter referred to as "the Act") in support of its application for certification. Shortly thereafter, the union filed the unfair labour practice complaint, and these files were, by Board direction, consolidated for hearing.

II. Evidentiary Issue

4. At the outset of the hearing, both counsel provided me with brief opening statements. Counsel for the company indicated that he would be asserting in argument that, as a result of the proclamation of the Act in November, 1995, the approach previously adopted by the Board to determine the issue of ascertaining the true wishes of the employees ought to change, in that the Board should now entertain the subjective testimony of employees regarding whether they felt able to vote freely, and whether their own votes reflected their true wishes regarding union representation. Counsel for Local 353 disagreed with this position, and asserted that the Act did not alter the Board's traditional practice whatsoever. After opening statements, counsel for the company commenced the calling of evidence.

5. After calling evidence from the two principals of the company, counsel for the employer called a number of employees to testify regarding the salient events alleged to constitute the unfair labour practices. When counsel commenced questioning the first such employee witness regarding his

opinion of his ability to vote freely and in a manner consistent with his true wishes respecting union representation, counsel for Local 353 objected to the question on the basis that it was not relevant. After some discussion, it was agreed that counsel for the company would continue to ask these questions of employee witnesses up to the last day of hearing scheduled for that week, at which time the issue of the relevance of the line of questioning would be argued and a decision rendered before the next hearing day. Ultimately, counsel for the company called four witnesses who testified to their personal views regarding their ability to cast their vote freely and in a manner consistent with their true wishes. Argument was entertained regarding the relevance of the line of questioning on January 16 and 23, 1997, and a “bottom line” decision in which I determined that the questions were not relevant to the enquiry was released to the parties on January 29, 1997. The reasons for that decision are set out immediately below.

(a) The Statutory Framework

6. Counsel made reference to the following section of the *Labour Relations Act*, R.S.O. 1980, c. 228, as amended:

8. Where an employer or employers' organization contravenes this Act so that the true wishes of the employees of the employer or of a member of the employers' organization are not likely to be ascertained, and, in the opinion of the Board, a trade union has membership support adequate for the purposes of collective bargaining in a bargaining unit found by the Board pursuant to section 6 to be appropriate for collective bargaining, the Board may, on the application of the trade union, certify the trade union as the bargaining agent of the employees in the bargaining unit.

Also referred to was section 9.2 of the *Labour Relations Act*, R.S.O. 1990, c. L.2, as amended:

9.2 If the Board considers that the true wishes of the employees of an employer or of a member of an employers' organization respecting representation by a trade union are not likely to be ascertained because the employer, employers' organization or a person acting on behalf of either has contravened this Act, the Board may, on the application of the trade union, certify the trade union as the bargaining agent of the employees in the bargaining unit.

Finally, specific reference was made to section 11(1) of the Act, which reads as follows:

11(1) Upon the application of a trade union, the Board may certify the trade union as the bargaining agent for the employees in a bargaining unit in the following circumstances:

1. An employer, employers' organization or person acting on behalf of an employer or employers' organization has contravened the Act.
2. The result of the contravention is that a representation vote does not or would not likely reflect the true wishes of the employees in the bargaining unit about being represented by the trade union.
3. No other remedy, including the taking of another representation vote, is sufficient to counter the effects of the contravention.
4. The trade union has membership support adequate for the purposes of collective bargaining in a bargaining unit found by the Board to be appropriate for collective bargaining.

Other sections of the Act, and other legislation of relevance, will be referred to in the text below where appropriate.

(b) Argument

7. The arguments made by counsel are set out below in somewhat abbreviated form.
8. Counsel for the company submitted that the passage and proclamation of the Act in November, 1995 reflected a substantial change in the labour legislation of this province, and not merely a reversion to the law as it stood prior to the passage of Bill 40, which was effective as at January, 1993. In particular, counsel noted that the union certification process has been entirely altered, substituting a vote-based system for the card-based system which had been a fixture in Ontario for decades.
9. It was submitted that section 11(1) of the Act is a prime example of the substantial changes introduced by the legislature. Counsel argued that it was apparent from the plain wording of section 11 that, once a representation vote has been held, should a trade union request automatic certification the Board ought to apply a subjective test to the determination of the true wishes of employees. On the other hand, should a representation vote not have been held prior to a hearing to deal with the trade union's request for an automatic certificate, it was submitted by counsel that the traditional objective approach would apply to the determination of the true wishes of employees. Counsel described section 11(1) as reflecting a "hybrid" test, and submitted that the two-pronged test highlighted the elevated role of both employee wishes and the representation vote in determining union representation.
10. In support of his argument, counsel referred to excerpts from *Driedger on the Construction of Statutes* (3rd Ed., Butterworths, 1994) in which it is stated that the evolution of current legislation may be relied upon in order to assist in its interpretation. Further principles identified by the text and emphasized by counsel during the course of argument are presumptions that amendments to the wording of a legislative provision are made for some intelligible purpose, and that substantive change between two successive versions of a legislative provision is intended. A further excerpt from the text identifies and discusses the principle that it is presumed that the legislature avoids superfluous or meaningless words, and that it does not pointlessly repeat itself. Accordingly, interpretations of legislation that render any portion of a statute meaningless or redundant should be avoided.
11. With these principles of statutory interpretation established, counsel directed my attention to the evolution of the automatic certification provisions of the Act. Both section 8 of the "pre-Bill 40" legislation and section 9.2 of that legislation as amended by Bill 40 contain the phrase "are not likely to be ascertained". In counsel's submission, that phrase denotes an objective inquiry by the Board. In contrast to that phrase, the key words in section 11(1) are those in clause 2 which read "does not or would not likely reflect the true wishes of the employees". Counsel submitted that the words create two disjoined statements, and therefore reflect two different scenarios. If a representation vote has been taken before the certification application proceeding comes on for hearing, the Board is to enquire into whether the vote "does not ... reflect the true wishes of the employees", a subjective enquiry. On the other hand, if a representation vote has not been taken before the certification application comes on for hearing, the Board's enquiry is different, in that it is to enquire into whether such a vote "would not likely reflect the true wishes of the employees", an objective analysis.
12. Counsel also considered the focus in the former legislation on "ascertaining" the true wishes of employees, compared to the focus in the Act on determining whether a representation vote "reflects" the true wishes of employees. Excerpts from the *Shorter Oxford English Dictionary* and *Words and Phrases Judicially Considered* were reviewed during argument. It was submitted that the word "ascertain" denotes an active but objective enquiry, whereas the concept of "reflection" can only be considered by reference to those whose views are being reflected. Counsel suggested that the concept of ascertaining true wishes - the objective enquiry - is only embraced in section 11(1) of the Act by the words "would not likely" in clause 2.

13. Counsel referred to one previous decision of the Board, *Centro Mechanical Inc.* [1996] OLRB Rep. Sept./Oct. 762 which considered the substance of section 11(2) of the Act. Section 11(2)2 of the Act contains language which is identical to that reflected by section 11(1)2 of the Act. Counsel directed me to the following comments of the Board, at para. 53:

In arriving at this conclusion, I have applied an objective test which the Board has long applied in both situations by asking: was it more likely than not that the applicant's conduct was such that a reasonable employee of average intelligence and fortitude would have his/her ability to exercise his/her rights under the Act and to express his/her wishes with respect to being represented by the union in his/her dealings with his/her employer compromised, such that the representation vote taken does not likely reflect the true[sic] wishes of the employees in that respect? Applying such an objective test does not mean that the Board cannot have regard to the subjective evidence of the persons effected [sic], and I did so in this case.

Counsel noted that it appeared that his argument had not been made in the *Centro Mechanical* case, and therefore that the panel of the Board in *Centro Mechanical* had not turned its mind to the analysis urged before me. Counsel submitted that the Board in *Centro Mechanical* had, in fact, fused the two branches of the test.

14. Counsel for Local 353, in response, asserted that none of the questions asked of the employer witnesses to date relating to whether they felt their vote reflected their true wishes regarding union representation were relevant to the enquiry to be made by the Board under section 11 of the Act. Assuming that it is established that the employer did commit one or more unfair labour practices, such that the provisions of section 11(1) of the Act have potential application, counsel questioned whether any employee would freely come forward to testify, in open hearing, that his or her employer had, through its conduct, caused him or her to vote in a manner that was not reflective of his or her true wishes. The testimony of any witness to the contrary, it was asserted, would have little value because it is inherently untrustworthy; that is, keeping in mind the balance of power in the relationship of employer and employee, one could not put any weight on an employee's assertion that his or her employer did not influence his or her vote.

15. Counsel referred me to *Burlington Golf & Country Club Limited* [1996] OLRB Rep. July/Aug. 505, where the Board, applying section 11(1) of the Act, adopted and applied the traditional, objective approach taken by the Board to the determination of the true wishes of employees. Also referred to by counsel during argument was the decision of the Divisional Court in *Dylex Ltd. v. Amalgamated Clothing and Textile Workers Union* (1977), 77 CLLC para. 14,112, in which the Board's traditional objective test was given judicial approval.

16. Counsel submitted that an analysis of section 11(1) ought to focus on the word "likely" which is found in both section 8 and 9.2 of the previous legislation, and section 11(1)2 of the Act. Counsel provided me with various dictionary definitions of the word "likely", which identified a corresponding meaning of "probable". In counsel's submission, section 11(1)2 of the Act does not house two separate tests, and the Board's enquiry is the same, whether or not a representation vote is taken before the Board's hearing into the unfair labour practice allegation underlying the request for automatic certification; that is, counsel asserted that the word "likely" relates to the phrase "does not" as well as the phrase "would not" in section 11(1)2. It was argued that if it were intended to be a dual test, the Legislature would have placed commas in the phrase such that it would read "the result of the contravention is that a representation vote does not, or would not likely, reflect the true wishes of the employees ...".

17. With respect to opposing counsel's analysis of the terms "ascertain" and "reflect", counsel submitted that the interpretation of section 11(1)2 of the Act did not turn on the use of these words by the legislature.

18. Counsel submitted that the interpretation of the provision as suggested by opposing counsel would lead to a “parade of witnesses” in which the testimony provided would be of highly dubious value. This is so whether it falls under section 11(1) of the Act, as here, or under section 11(2) of the Act, as in the *Centro Mechanical* case, cited above. Counsel questioned how any witness could be effectively cross-examined on his or her “feelings” regarding the ability to vote freely or whether he or she voted in such a way as to reflect his or her true wishes.

19. It was also submitted by counsel that the effect of requiring the “parade of witnesses” would be to trivialize the protections offered by section 119(1) of the Act. Counsel suggested that to allow the employer to rely upon the type of evidence in dispute here would be tantamount to an abuse of the Board’s processes, because there can be no doubt that the evidence would be given no weight at the end of the day, and the negative consequences of calling the evidence and responding to it would be devastating to the union and its supporters.

20. In response to counsel for Local 353, counsel for the company noted that the panel of the Board in *Burlington Golf & Country Club Limited*, cited above, did not consider an argument such as that made before me in this case. Counsel disagreed with opposing counsel’s interpretation of the language of section 11(1)2 of the Act, and asserted that she was, in effect, reading out the words “does not” from the provision. If the legislature had not intended to change the Board’s enquiry, counsel asked, why did it not just retain the language reflected by section 8 or 9.2 of the previous legislation? Counsel stated that it must be assumed that the drafters of the Act were aware of the state of the law at the time the Act was framed.

21. Counsel for the company conceded that certain “procedural issues” or difficulties may result from his suggested interpretation of section 11(1)2 of the Act, and that these difficulties may require “creative thought” to resolve in practical terms. Counsel also acknowledged the policy function of the Board in interpreting the Act. However, counsel submitted that the policy function of the Board must be exercised having regard to the clear words of the Act. Counsel asserted that there was no real compromise to the confidentiality of membership evidence or to employee desires should his interpretation of the Act be adopted by the Board.

(c) Decision

22. Having reviewed and carefully considered all of the submissions, case law and materials provided during argument, I was of the view that the questions in dispute were not relevant to the enquiry that I am required to make under the Act, and therefore that they could not be asked of witnesses. The reasons for this conclusion are set out directly below.

23. First, I agree with counsel for the employer that the Act is a new point of departure for the Board in many respects, particularly with respect to representation applications. For many decades the primary means of union certification in Ontario was based upon the presentation by a trade union to the Board of a sufficient number of union membership applications or cards representing support in a bargaining unit appropriate for collective bargaining. In November, 1995, the primary means of certification in Ontario changed to a vote-based system. Although a trade union must still present to the Board a sufficient number of union membership applications or cards to obtain a representation vote of the employees in an appropriate bargaining unit, in the vast majority of cases a certificate will only issue to a trade union if the majority of employees in the bargaining unit voting at the representation vote choose to have the trade union represent them in their employment relations with their employer. For a detailed comparison of the certification processes under the Act and its predecessors, see *The Corporation of the City of Toronto* [1996] OLRB Rep. July/Aug. 552.

24. As noted above, in the vast majority of cases a trade union will only obtain a Board certificate enabling it to represent the employees of an employer in an appropriate bargaining unit if it obtains a majority of the votes of employees in that bargaining unit who cast ballots in a representation vote. However, a certificate may also be obtained by a trade union should the Board determine that the provisions in the Act respecting “automatic certification” have been established. As highlighted above, the Act and its predecessors have, for many years now, contained a provision entitling a trade union to a certificate where the employer’s conduct in violating the legislation is sufficiently serious as to warrant certification, on the theory that, because of that unlawful behaviour, the process of selecting a collective bargaining agent has been irreparably harmed. In those circumstances, the Act, and its predecessors, have sanctioned the remedy of an automatic certificate in order to ensure that the employer does not benefit from its own wrongdoing, and, in part, to deter future violations of the Act.

25. To date, there is no doubt that the Board has taken an objective approach to the determination of ascertaining the true wishes of the employees. As was noted during argument by counsel for Local 353, in 1977 the Divisional Court in *Dylex Ltd. v. Amalgamated Textile Workers Union*, cited above, approved the objective test adopted by the Board. At page 299 of the decision, Morden J., for the Court, notes as follows:

In my view the Board did not ask itself the wrong question and so decline jurisdiction. By the statute the question was whether the employer’s contravention of the Act was such “that the true wishes of the employees ... are not likely to be ascertained” - not what *were* the true wishes of the employees. (emphasis in original)

The cases in which the Board has applied an objective test to the issue of the true wishes of employees are legion, and I do not propose to list them here. During the course of argument counsel for the company conceded that the Board’s traditional approach was to consider the question of the true wishes of employees in an objective manner, and the validity of the comments of the Divisional Court in *Dylex Ltd. v. Amalgamated Textile Workers Union*, cited above, were not disputed. However, as was noted by counsel for the company, the very question before me is whether this historical approach remains under the current Act, and that question can hardly be answered solely by reference to the approach adopted by the Board historically.

26. I have carefully considered the presumptions of legislative interpretation which were relied upon by counsel for the company during the course of argument. Considered on their face, each of them identifies a basis for the legitimacy of counsel’s argument. However, the principles identified by counsel are not exhaustive of the vast number of principles or presumptions applied in interpreting legislation. Accordingly, I propose to briefly outline other principles of interpretation in order to achieve a more comprehensive basis upon which to interpret the words in question before me. These principles are also drawn from *Driedger on the Construction of Statutes*, (hereinafter referred to as “*Driedger*”), cited above.

27. Courts have, over hundreds of years, developed certain “rules” of statutory interpretation (such as the “plain meaning rule” and the “golden rule”). Each of these “rules” has been held in favour during certain periods of judicial history, and each has, typically, excluded the other as possible alternatives to the interpretation of legislation. In current times, it is recognized that each of the “rules” of interpretation has a place in the interpretation of legislation.

28. As the tribunal created by the Act with the primary responsibility to interpret its provisions, the Board is ideally situated to interpret the Act in a manner which furthers the purpose of the legislation. In that regard, there can be no doubt that, at the end of the day, the Board should attempt to determine the meaning of the words of the Act in context, keeping in mind the purpose of the legislation, the consequences of proposed interpretations, and the various presumptions and rules of interpretation

(some of which were referred to during argument). There can also be no doubt that, if appropriate, certain external aids to interpretation can be relied upon by the Board to interpret the Act.

29. During argument, there was reference made to the “intention” of the legislature in wording clause 2 of section 11(1) of the Act in the manner that it did. When I questioned counsel for the company regarding what I felt was an absurdity which would result from his proposed interpretation of the Act, I asked him whether it could ever have been the intention of the legislature to legislate such a result. Quite understandably, counsel hesitated to speculate on what the legislature had intended by choosing the wording it did.

30. I do not consider an historical search for the legislature’s “intention” to be all that helpful. As is noted by Professor Sullivan in *Driedger*, at p. 133:

When seized with a case, the court has a responsibility to produce an appropriate outcome. To say that an outcome is appropriate because it was “intended” by the legislature is in most cases an unhelpful fiction. Generally speaking, a legislature’s intentions are not discoverable except through a process of interpretation that is entirely controlled by the court. To impute the conclusions reached at the end of that process to the legislature may be good rhetoric, but it is merely rhetoric.

Quite simply, the search for a legislative “intention” is quite often a search without end. I do not propose to embark on such a search in the circumstances before me, as it is, in my view, quite impossible to discern a clear legislative “intention” regarding the words contained in the disputed provision of the Act.

31. Turning to the words in question, their meaning should be discerned by reference to the context within which they are utilized. When the words “a representation vote does not or would not likely reflect the true wishes of the employees” are read in their immediate context, the first impression one gets is that the words do, in fact, denote a two-pronged enquiry, in which the Board should consider either the actual wishes of the employees (when a vote has occurred) or make an objective assessment of those wishes based upon all of the evidence before it (when a vote has not occurred). The word “likely” which is contained in section 11(1)2 does not appear to relate to the words “does not”, and reference to the wording of the french language version of section 11(1)2 of the Act (“un scrutin de representation ne reflète pas ou ne reflèterait vraisemblablement pas les vrais desirs des employés”) appears to confirm this interpretation. Considered solely in the context of the interpretative presumptions relied upon by counsel for the company, the suggested interpretation is a plausible one.

32. When read in the broader context of the Act, however, this interpretation becomes highly questionable. The legislature is presumed to know the law (both the common law and the statute law), and is also presumed to be aware of the case law interpreting statutes. Further, it is presumed to have knowledge of practical affairs and to be familiar with the problems its legislation is meant to address (see *Driedger*, cited above, at pages 156-157). It is assumed that the provisions of a piece of legislation fit together to make a coherent whole. As noted above, and by company counsel during argument, it is also presumed that the legislature avoids superfluous words and that every word in a statute is to have a specific role to play in advancing legislative purpose. It should be noted here that these presumptions are just that - presumptions - and are rebuttable in nature.

33. One other principle of statutory interpretation must be referred to here, and that is the presumption that legislation is not intended to produce absurd consequences. If the interpretation of a piece of legislation in a particular manner leads to an absurd result, it is presumed that such a result was unintended. More importantly, where it appears that the consequences of interpreting legislation in a certain fashion would lead to an absurdity, the interpretation can be rejected in favour of a plausible alternative that avoids the absurdity. As is noted by Professor Sullivan in *Driedger*, at page 85:

It is now well established that the consequences of applying legislation may be taken into account in every case, and to avoid absurd or unacceptable consequences, the ordinary meaning may be rejected even if it is "plain". There is only one limitation on the court's jurisdiction to avoid absurdity: the interpretation adopted must be one that the words are reasonably capable of bearing.

Accordingly, if the consequences of interpreting legislation in a particular manner is to cause an absurdity of some nature to result, the proposed interpretation - even if it results from the plain words of the Act - may, in appropriate circumstances, be rejected.

34. With these principles established, it is pertinent to refer to section 2 of the Act, the section which identifies the various purposes of the Act. It is significant to observe that the purpose provision is contained in the body of the Act and is not in the nature of a preamble, which typically is found outside of legislation. Amongst those seven purposes, the following two are found:

1. To facilitate collective bargaining between employers and trade unions that are the freely-designated representatives of the employees.
7. To promote the expeditious resolution of workplace disputes.

I will refer to these legislative purposes in more detail below. However, I will observe here that the interpretation of section 11(1)2 of the Act preferred by the company would, in my view, appear to contradict the above purposes of the Act.

35. The overall scheme of the Act need not be set out in exhaustive detail here. It suffices to say that the legislation creates certain unfair labour practices which are contained in sections 70 to 88 of the Act. Many (though not all) of the unfair labour practices are applicable to the context of union organizing. It is contrary to the Act to commit an unfair labour practice. Violations of the unfair labour practice provisions of the Act are subject to the broad remedial authority of the Board, as described by section 96(4) of the Act. It is also worth noting that, with the consent of the Board, an employer who contravenes the Act may be prosecuted for that violation, and, if convicted, is liable, if an individual, to a fine of not more than \$2,000 or, if a corporation, to a fine of not more than \$25,000.

36. I note all of the above because it is evident from a reading of the Act that the legislation, in order to achieve the purpose of facilitating collective bargaining between employers and freely-designated trade unions, has been drafted in such a manner as to discourage employers from committing unfair labour practices. This may be a somewhat trite observation, but it bears notice because, in my view, a consequence of the interpretation of section 11(1)2 of the Act urged by the company is that it would more than likely be in the employer's interest to violate the Act in certain circumstances. Worse yet, it would be in the employer's interest to violate the Act in a *more egregious* way rather than a subtle manner. I will elaborate on this below.

37. It appears to me that the approach suggested by counsel for the company would have the practical effect of eliminating the automatic certification provision from the Act. Assuming that subjective evidence of a witnesses' ability to vote according to his or her true wishes could, potentially, have relevance to the issue of the "true wishes" of the employees, and therefore in whole or in part be determinative of the application, an employer would be entitled to call testimony from employees who would state that they marked their ballot in the way they truly desired. The union would be entitled to call evidence of a similar nature in order to establish that some employees may have voted differently because of the employer's conduct.

38. But few, if any, employees would be willing, even under summons and under oath, to publicly announce that they would have voted one way but for their employer's conduct. As a practical matter, the witnesses for the union who could buttress its case would be individuals, previously

identified by the union as supporters, who would have otherwise voted for the union but in fact did not because of the employer's conduct. It is highly unlikely that these people would be willing, in the presence of the employer at open hearing, to assert that their employer acted inappropriately towards them, to admit to their association with the union, and to their preference for union representation. The end result is that trade unions would be unable, in the normal course, to call this type of evidence in support of their cases. If the subjective evidence of the voters' "true wishes" is to have weight, and therefore to be capable of tilting the balance towards dismissal of the application, as a practical matter the automatic certification provision of the Act will become unavailable to trade unions for lack of evidence.

39. The absurdity of this situation is patently evident if one considers that to permit evidence of this nature would also have the effect of rewarding those employers that most blatantly violate the Act, and commit the most egregious unfair labour practices. Take as an example an employer that lays off its entire workforce upon learning of the union's application for certification. It subsequently re-employs the individuals laid off but warns them about voting for the union. The union receives no support when the results of the representation vote are announced, and relies upon section 11(1) of the Act for a certificate.

40. In these circumstances, it is hard to believe that the employer would have difficulty rounding up employees to testify to their belief that they voted freely and that their true wishes were reflected by their votes, whether that was or was not the case. This highlights the untrustworthiness of the evidence. On the other hand, which individual would come forth to - in effect - admit that he or she would have voted for the union but felt that his or her vote did not reflect his or her true wishes because of the employer's behaviour? Quite simply, no one would be willing to admit to such a thing. The union is put in the untenable position of putting its supporters at risk. The evidence which is adduced by the employer's witnesses is, for the most part, incapable of challenge in cross-examination, because of its subjectivity. And to highlight the perversity of this scenario, the Board would, by entertaining the evidence, place a premium on egregious employer behaviour, because the more intimidatory an employer's pre-vote misconduct, the more likely it is that employees would testify to having voted according to their conscience - and therefore in favour of their employer's interests. This is a patently absurd result. Yet that is the practical result of the theory put forth by the company.

41. Just as absurd are the consequences of the "hybrid" test theory. It is not at all evident to me why the legislature would distinguish between certification applications where a representation vote has been taken - in which subjective evidence of voting in accordance with one's true wishes would be entertained - and situations where a representation vote has not been taken - in which the Board's traditional objective approach to evidence of that nature would continue to apply. The result of having a two-pronged or "hybrid" approach would be that the consequences of the hearing of subjective evidence - the difficult "procedural issues" conceded by company counsel and described above - would only occur if a representation vote had been taken and lost by the union prior to the Board hearing. If the union became aware of the events alleged to constitute the unfair labour practice sufficiently in advance of the representation vote to withdraw its application, or to satisfy a Board panel that the vote ought to be cancelled, it would be the beneficiary of the Board's traditional test; but if not, it would be burdened by the inherent difficulties of responding to and/or calling subjective evidence of the true wishes of voters. Once again, the employer that commits an egregious unfair labour practice *immediately* before the vote, when the organization campaign is entering its last and perhaps now one of its most sensitive phases, benefits from the evidentiary difficulties created by the two-tiered approach. Quite simply, the distinction suggested by company counsel is without rational basis.

42. Adopting the approach asserted by the employer also causes me concern in respect of the confidentiality provisions of the Act. Section 119(1) of the Act provides as follows:

The records of a trade union relating to membership or any records that may disclose whether a person is or is not a member of a trade union or does or does not desire to be represented by a trade union produced in a proceeding before the Board is for the exclusive use of the Board and its officers and shall not, except with the consent of the Board, be disclosed, and no person shall, except with the consent of the Board, be compelled to disclose whether a person is or is not a member of a trade union or does or does not desire to be represented by a trade union.

During the course of the evidence in these proceedings, I read to each of the employee witnesses a brief statement in which I explained the basic substance of this protection contained in the Act. I did so in order to ensure, to the greatest extent possible, that this provision of the Act was observed by the witnesses.

43. I am not as confident as counsel for the company that the effect of interpreting section 11(1)2 of the Act in the manner suggested by him will not, as a practical matter, result in the identification of those individuals who desire to be represented by the trade union. If it is necessary for the trade union to call evidence of individual employee views as to their ability to vote according to their true wishes, the union would, quite naturally, turn to its members and supporters for testimony. Those individuals who agree to testify (and as I stated above, I believe these individuals would be few and far between) will undoubtedly be identifying themselves as being aligned with the union. There may well be those who will not hesitate to do so. But there will be, just as certainly, those individuals who are required to testify for the union but who will not want to reveal their desire for union representation. If section 119(1) of the Act is to maintain any meaning or substance, it cannot be that other provisions of the Act should be interpreted in such a way as to eviscerate the protections created by that section of the Act.

44. Taking all of the above into account, I am satisfied that section 11(1)2 of the Act cannot be read in the manner suggested by counsel for the company. Read in the context of the entire Act, including the purposes of the Act, the unfair labour practice provisions of the Act, and the confidentiality provision of the legislation, the words “does not or would not likely reflect the true wishes of the employees ...” cannot establish a two-tiered test to determine the true wishes of employees, dependent upon whether a representation vote has been taken as at the time of the Board hearing. It does not appear to me that the interpretation sought by the company will “promote the expeditious resolution of workplace disputes”. If anything, Board hearings will be drawn out in order to accommodate a “parade” of witnesses on behalf of the employer.

45. In my view, if it is alleged that an employer has committed one or more unfair labour practices such that a representation vote “does not or would not likely” reflect the true wishes of employees, that determination can only be made upon an objective - not a subjective - assessment of all of the facts of the case.

46. This appears to be a case of first impression under the Act. There are no Board authorities strictly on point. Both *Burlington Golf & Country Club Limited* and *Centro Mechanical*, cited above, were determined by panels of the Board without reference to the argument entertained before me. To the extent that *Centro Mechanical* may be interpreted to suggest that subjective evidence of the true wishes of employees can be considered by the Board under section 11(1) of the Act, I respectfully disagree with such an interpretation.

47. In considering this matter I reviewed other provincial legislation speaking to the issue of automatic certification, and case authorities commenting on the meaning of the legislation. The legislation in Nova Scotia bears special comment, as the language contained in that province’s labour relations statute is, to some extent, similar to that of section 11(1) of the Act. The *Trade Union Act*, R.S.N.S. 1989, c. 475 contains the following provision which speaks to automatic certification:

- 25(9) Where, in the opinion of the Board, an employer or an employer's organization has contravened this Act in so significant a way that the representation vote *does not* reflect the true wishes of the employees in the bargaining unit determined to be appropriate for collective bargaining, and in the opinion of the Board the applicant trade union, at the date of the filing of the application for certification, had as members in good standing not less than forty per cent of the employees in the unit, the Board may, in its discretion, certify the trade union as bargaining agent of the employees in the unit. (emphasis added)

48. Subsequent to the completion of argument, and by way of a separate attendance of counsel at the Board, I brought a number of authorities to the attention of counsel for comment, including the decision of MacDonald J. of the Supreme Court of Nova Scotia in *White Point Beach Holdings Limited v. United Food & Commercial Workers International Union* (1989), 90 CLLC para 14,028. The Nova Scotia Labour Relations Board decision is not reported. However, the headnote of the reported court decision indicates that the Nova Scotia Board certified the United Food & Commercial Workers International Union as the bargaining agent for a bargaining unit of employees of the employer, pursuant to what is now section 25(9) of the Act. The employer submitted that the Nova Scotia Board had erred in its interpretation of the relevant legislation, and brought a judicial review application to the courts.

49. Mr. Justice MacDonald was required as a result of the application to consider the scope and nature of what is now section 25(9) of the Act. At page 12,240, MacDonald J. makes the following comments:

There are two things, of course, in s. [25(9)] which are: there has to be a contravention of the Act and the contravention must be so significant that a vote does not necessarily represent the true wishes of the employees.

In the argument before me, a great deal was made of the fact that at the hearing before the Board ten, I believe, of the eleven witnesses said their vote represented their true wishes. However, I do not know if that can be entirely accepted. If an employee is so intimidated so that in the privacy of a voting booth he cannot express his true wishes, certainly, it would appear to me, that the intimidation would carry forward onto the witness stand where he had declared his disposition in public, more or less. The key word, of course, in my opinion, is in a "significant" way. The only test would have to be somewhat objective, I should think.

This decision was unsuccessfully appealed to the Nova Scotia Court of Appeal by the employer. In a brief judgment ([1990] N.S.J. No. 163), Clarke C.J.N.S., speaking for a three judge panel of the Court, stated that the Court found "no error on the part of the trial judge which would cause this court to reverse or set aside any of his findings or conclusions".

50. Also brought to the attention of counsel was the decision of the Nova Scotia Labour Relations Board in *Michelin Tires (Canada) Ltd.* (1980), 80 CLLC para 16010. In that decision, the trade union which had applied for certification had requested that the Board certify it on the basis of the automatic certification provisions of the Nova Scotia legislation. The Board determined not to accede to this request. In explaining its rationale for not applying what is now section 25(9) of the Act, the Board had opportunity to make reference to the nature of the evidence it would consider, at pages 480 and 481:

The Board will hear direct evidence from employees that violations of the Act induced a vote that did not reflect their true wishes, but such direct evidence is not necessary to bring section 24(9) into play. ... [W]e are satisfied there are circumstances in which this Board is entitled to assume, based on common experience, that employer unfair labour practices have diminished support for a trade union certification.

Accordingly, the Nova Scotia Board, in this decision, specifically indicated that an objective approach to the issue of "true wishes" was appropriate.

51. Also raised with the parties during argument was a decision of the Industrial Relations Council of British Columbia in *Michael C. Wright Sales Ltd.* (Case No. C224/90, December 5, 1990) and an earlier decision of the Labour Relations Board of British Columbia in *E.J. Jackson Cabaret* (Case No. 294/86, November 20, 1986). Section 8(4)(e) of the pertinent labour relations legislation read, at that time, as follows:

Where, on inquiry, the [Council or Board] is satisfied that any person is doing, or has done, an act prohibited by section 3, 4, 5, 6, or 7, it may, if the employees affected by the order are seeking trade union representation, certify or refuse to certify the trade union, notwithstanding that, by reason of an act prohibited by section 3, 4, 5, 6, or 7, the true wishes of the employees *cannot* be ascertained; but the [Council or Board] may impose conditions it considers necessary or advisable on the trade union, and if the conditions are not substantially fulfilled to the council's satisfaction within 12 months from the date of the certification, or in a lesser period ordered by the [Council or Board], the certification shall be deemed cancelled.

(emphasis added)

52. In *Michael C. Wright Sales Ltd.*, cited above, the employer argued that automatic certification ought not to issue under the above provision because there was no evidence that the illegal conduct had any adverse impact on the union in its organizing campaign. It was also noted that there was no evidence of a negative impact on the employees' ability to freely make a decision in the representation vote. The Council disagreed. At page 32 of its decision, it made the following observation, citing the *E.J. Jackson Cabaret* decision as authority:

Although no employees came to testify that the illegal job terminations, Wright's speeches, or managers' discussions influenced them to vote against the union, this is not surprising. A union should not be expected, in order to obtain an automatic certification, to present employees as witnesses who are willing to testify in front of their employer that his conduct changed their minds at the ballot box.

53. Both the current and previous Nova Scotia legislation, and the former British Columbia legislation, contain provisions similar to the current Ontario Act, in the sense that the provisions appear on their face to require the respective Board to ascertain the actual true wishes of the employees, rather than to apply an objective standard in determining the true wishes of employees. Nonetheless, the respective tribunals have applied an objective approach to that determination. In Nova Scotia the Court of Appeal has recently confirmed an objective test, notwithstanding language that is identical to the first "branch" of the wording in Section 11(1)2 of the Ontario Act.

54. I am, of course, not bound by any of the authorities set out above. However, I believe it is proper to follow their general thrust, because they reflect an appropriate approach to the interpretation of the Ontario Act. The words "does not or would not likely reflect the true wishes of the employees" contained in section 11(1)2 of the Act do appear to speak to two distinct situations - one where a representation vote has been taken, and the other where a representation vote has not been taken. However, there is no reason apparent to me to interpret the legislation as requiring actual evidence of employees to establish that they did or did not, on the day of the vote, vote according to their true wishes. On the contrary, the only rational interpretation of those words, in the context of the entire Act, is otherwise. Accordingly, I am of the view that the Board ought to make an objective assessment of the ability of employees to vote according to their true wishes, whether a representation vote has or has not occurred as at the date of the hearing.

(d) Conclusion

55. For all of these reasons, I concluded that the questions asked of witnesses regarding their true wishes were inadmissible.

III. The Merits

(a) Credibility

56. It is necessary, prior to setting out the facts as I find them, to make brief reference to the credibility assessments that I have had to make when determining the facts. Prior to the testimony of any of the witnesses, an exclusion order was granted at the request of the employer. Accordingly, with the exception of an advisor, potential witnesses were not permitted to stay in the hearing room during the testimony of other witnesses, and all witnesses were directed to not discuss their testimony with anyone once their testimony had been completed. I note here that on the first day of the hearing I explained to the numerous employees who were in attendance the meaning and significance of the exclusion order. To the best of my knowledge, it was adhered to by the witnesses who testified in these proceedings.

57. Much of the testimony in these proceedings was contradictory, and accordingly it has been necessary for me to consider the credibility of all of the witnesses who testified. I have considered various factors in making my assessments of credibility, in accordance with the views of Mr. Justice Riddell, as expressed in the decision of *Wallace v. Davis* (1926), 31 O.W.N. 202 (C.A.), at p. 203:

... the credibility of a witness in the proper sense does not depend solely upon his honesty in expressing his views. It depends also upon his opportunity for exact observation, his capacity to observe accurately, the firmness of his memory to carry in his mind the facts as observed, his ability to resist the influence, frequently unconscious, of interest to modify his recollection, his ability to reproduce in the witness-box the facts observed, the capacity to express clearly what is in his mind - all these are to be considered in determining what effect to give to the evidence of any witness.

Furthermore, the testimony of each witness was considered in the context of its harmony, or lack of harmony, with the probabilities disclosed by the case as a whole.

58. Many of the witnesses had difficulty recalling the exact dates of certain events. Where the date of the event alleged to have constituted inappropriate conduct is critical, I have carefully considered the testimony of the witness or witnesses to ensure that it has been properly established that the event occurred as asserted by Local 353. In some situations I have not found certain facts to have been established on the basis that the evidence does not satisfy me that the witness or witnesses testifying to the event could clearly recall when the event testified to had actually occurred.

59. Dealing with specific individuals, I found the testimony of both Andrew Kimens and Art Kimens to be unacceptable on numerous occasions. Andrew Kimens was the first witness to testify in these proceedings, and also offered reply testimony to close out the evidence. His recall while giving testimony in chief, and in cross-examination of that testimony, was often poor. In reply testimony, and the resulting cross-examination, Andrew's recollection became much clearer regarding incidents that he previously could not remember, contrary to the usual expectation that one's recollection of past events generally fades over time. Art Kimens' testimony was riddled with inconsistencies, and I have not accepted as true much of his evidence.

60. I have also rejected, for the most part, the testimony of Nick Lykos and Amir Ershadi, who I found to be unreliable witnesses. Mr. Lykos has been employed by the employer for over 25 years, and could not give his testimony in a manner that divorced his natural inclination to favour the employer. As an example, it was Mr. Lykos' testimony that the question of the union was hardly touched upon at the meeting of October 1, 1996. Every other witness admitted that it was a significant issue of discussion. Taking everything into account, I put little, if any, weight on the testimony of Mr. Lykos.

61. Mr. Ershadi, who was called as a witness by Local 353, was not credible in many different ways. He was argumentative, unresponsive, sarcastic, and clearly harboured a rather large chip on his shoulder regarding continuing pay disputes with the employer. His evidence was, on occasion, internally inconsistent. At least twice in his testimony he relied upon a poor memory as an explanation for inconsistent testimony. In the circumstances, I am not prepared to rely upon Mr. Ershadi's testimony regarding one-on-one discussions with Art Kimens or Andrew Kimens in order to make findings of fact. I note here that I am not satisfied that any of the financial claims made by Mr. Ershadi had, as their genesis, the exercise of Mr. Ershadi's rights under the Act. I therefore make no comments regarding the legitimacy of his financial claims against the employer.

62. Finally, I have, in certain situations, rejected the evidence of Art Campbell, who testified on behalf of the employer. Mr. Campbell exhibited the character of a "soldier of fortune" during the course of the key events which comprise this proceeding. It is my view that Mr. Campbell has played both the union and the employer off of each other for his personal gain. There is nothing illegal in doing so, but it does create certain challenges in assessing his credibility. It was evident by the time that Mr. Campbell had completed his evidence that he had not testified truthfully to certain matters.

63. During the course of the hearing, I heard the testimony of 15 witnesses. At times, the evidence was, of necessity, extremely detailed. I found that some of the witnesses could recall events of significance more easily than others, and that those witnesses who were straining to recall certain events on occasion would "fill in" the gaps of their memories by testifying to what they believe they "would have done" in the circumstances. I have treated that evidence very carefully, and for the most part I have rejected it as the basis for a finding of a significant fact.

(b) The Facts

64. The employer operates as an electrical contractor, primarily in the low-rise, residential sector of the construction industry. It has been operated, for a number of years, as a father and son business. Art Kimens, the father (hereinafter referred to as "Art"), is a Master Electrician who has been operating the company since 1965, initially in partnership with another individual, Mr. Jack Kaufman. Mr. Kaufman has not been involved in the business since approximately 1990. In 1991, Art's son, Andrew Kimens (hereinafter referred to as "Andrew"), became a 50% shareholder in the business. Prior to that time, Andrew had had significant exposure to the business, as son of a part owner, and as a summer helper since the early 1980's. He has worked full time in the business since the spring of 1990.

65. During the 1990's, the employer has employed a varied number of individuals, fluctuating between 5 and 27, depending upon the amount of business. In 1995, the employer employed 12-15 individuals; in October, 1996, at the time of the application for certification, the business employed approximately 20 workers. The previous summer, employment had peaked at 27. Business tends to be busiest from May to October, peaking in September and October of each year. The company employs both hourly-paid workers and pieceworkers, on a ratio of 1 to 2, respectively. Pieceworkers are paid on a per house basis. The rates of payment are based primarily on the size of the house and the type of work performed - roughing in, finishing, or installation of the meter base and main electrical panel. Pieceworkers are expected to prepare an invoice for the work performed, and submit it to the employer for payment. Payment is made by the employer subject to a holdback for deficiencies. There was no dispute, for the purposes of these proceedings, that the pieceworkers were employees of the company.

66. At all material times, the employer operated at work sites in or around the Metropolitan Toronto area. The employer's sites extend as far west as Mississauga, and as far east as the city of Oshawa. Art and Andrew currently split responsibility for monitoring these sites on an east/west basis; Andrew is responsible for the sites west of Toronto, and Art is responsible for the sites east of Toronto.

67. I heard a great deal of evidence regarding how the employer obtained contracts to perform electrical work on new home developments. As is common in the residential home building industry, the process involves bidding on projects from take-off's of the homes to be built, and it was the uncontradicted evidence of Andrew, which I accept, that price is the critical factor which determines if an electrical contractor is successful in obtaining a contract with a non-unionized homebuilder for electrical work at a particular development.

68. Andrew, as part-owner of the employer, is responsible for numerous administrative tasks of the company. He prepares the payroll, remits the various taxes and other payments to the respective government agencies, and orders and prepares materials for electricians on the work sites. He is responsible for paying invoices and bills sent to the employer. He is also responsible for ensuring that all is well on his sites west of Toronto. Accordingly, he visits each of these sites on a daily basis, with materials, and ensures that each of his electricians has what he needs to perform the work. Andrew interacts with the builder's site supervisors as required. Although there was not a great deal of testimony respecting Art's responsibilities (most of the allegations regarding "on site" improprieties related to Andrew), Art visits each of his sites on a daily basis as well.

69. Testimony was offered by Art respecting a successful organization of the employer by Local 353 in 1976. At that time, Local 353 obtained a certificate from the Board to represent all electricians and electrical apprentices in the employ of the employer in Board Area 8, with the usual managerial exceptions. Art represented the employer at the Board hearing, and a number of employees also intervened in order to establish the voluntariness of certain petition documentation that had been filed with the Board. After a hearing was held, the Board placed no weight on the petition documents filed and made the following observations at paragraph 7 of its decision dated June 9, 1976:

The Board has reviewed the evidence in this matter and has come to the conclusion that the employer was inextricably bound up with the "change of heart". The employer threatened termination, conducted a meeting with his employees at which he asked that they change their minds, he promised to negotiate with them, he provided the paper upon which the statements were written, collected the statements and brought them to the Board. In the circumstances the Board must conclude that the statements were not voluntary and as a result the Board declines to order a vote and instead, having regard to the membership evidence, certifies the applicant.

70. An application for termination of these bargaining rights was brought before the Board within one year of the bargaining rights having been obtained by Local 353. The decision of the Board (reported at [1977] OLRB Rep. May 275) indicates that the workforce of the employer significantly decreased after Local 353 obtained its certificate in 1976. The majority of the Board concluded that the termination application was voluntary, and directed that a representation vote be held. In the course of so doing, the majority of the Board noted the following, at paragraph 10:

... Although the decision to terminate bargaining rights in the face of the \$15,000 settlement achieved by the union is an unusual response to say the least, there is evidence before the Board to suggest that the employees perceive of the downturn in the respondent's [sic] business as having been caused by its unionization. Approximately one-half of the twenty man work force has been laid off in the last year. The Board is not prepared to discredit the testimony of the employee witnesses because of what may or may not be a faulty perception on their part. In the absence of evidence to indicate that the company was in any way involved in the application, and in the face of first hand evidence of the origination, preparation and circulation of the statement which, in all material aspects, stood up under cross-examination, and which established that the origination, preparation and circulation were free of management interference, the Board is compelled to find that the statement is a voluntary expression of those who signed it.

Ultimately, the representation vote to terminate bargaining rights was successful, and Local 353 ceased to represent electricians employed by the employer. For the 19 years since this termination application, the employer has operated as a non-union electrical contractor.

71. It was Art's testimony that after the employer was certified in 1976, it attempted to obtain work but had a difficult time competing because of the higher rates it had to work with. He also indicated that there were fewer union jobs to bid on than non-union jobs. This resulted in work being limited to 2 or 3 days per week. Employment fell to approximately 10 - 12 employees. Art indicated that after the bargaining rights of Local 353 were terminated, the employer could compete more easily for work.

72. In the summer of 1996, Local 353 undertook an organizing campaign with the ultimate goal of organizing residential electrical contractors within its geographical jurisdiction. During that summer, Mr. Barry Stevens and Mr. Perry Speranza, organizers working for Local 353, canvassed various work sites in the Toronto area, attempting to identify the electrical workers, who they worked for, and where they were working. Mr. Stevens and Mr. Speranza initially spent one month meeting with and speaking to electrical workers without signing the individuals to membership application cards. Towards the end of August, 1996, Mr. Stevens and Mr. Speranza commenced the process of obtaining signed membership application cards from these electrical workers.

73. At about this same time, Andrew attended a meeting of electrical contractors and became aware that a number of his competitors were facing organizing efforts from Local 353. He was, at that time, unaware of any organizing that had occurred with regard to his company. A lawyer who attended at the electrical contractors meeting provided some information to those present about how unions are certified and the general structure of the Act, including the one year bar to a further application should Local 353 lose a representation vote.

74. Shortly thereafter, Andrew spoke to one of his employees, Mr. Dennis Pezzutto, and inquired whether Mr. Pezzutto had come across any union literature on his site, or whether Local 353 had approached him. In fact, Local 353 had not approached Mr. Pezzutto, and Andrew was advised accordingly. At the same time, Andrew indicated to Mr. Pezzutto that he would like to work out a benefit plan for employees, something that had never been raised with Mr. Pezzutto before. The evidence establishes that Andrew had, previously, engaged in certain discussions with at least two other employees respecting the need for a benefit plan, but that nothing of any substance had resulted from these discussions.

75. In early September, 1996, Mr. Pezzutto obtained a flyer that had been left by Mr. Stevens or Mr. Speranza on one of the work sites. Mr. Pezzutto contacted Mr. Stevens on September 5, 1996. The next day, Messrs. Stevens and Speranza met with Mr. Pezzutto at his work site. Mr. Stevens also had some contact with other employees of the employer on that day, and obtained a relatively positive response from these individuals. Some membership applications were obtained by Local 353 at that time. It was determined by Messrs. Stevens and Speranza to hold a meeting of all employees of the employer in order to explain to them the benefits of joining Local 353. Accordingly, a meeting was arranged for the evening of Wednesday, September 11, 1996, at the Travelodge hotel at Highway 400 and Finch.

76. Approximately 8 employees of the employer attended at the Travelodge hotel on the evening of September 11, 1996. Messrs. Stevens and Speranza explained to those present the role of the union, what it could do for the employees of the company, and distributed a brochure. There was a discussion regarding how trade unions become certified to represent the employees of a company. It was also noted that there would be a representation vote with the majority wishes of those voting being the determining factor.

77. Of some significance, there was also a discussion at this meeting of how, if at all, the increased wage and benefit costs resulting from unionization would affect the cost to the builders of constructing a home. It was the opinion of the union, reflected by its brochure distributed to those in

attendance, that the additional cost to the builder (and, ultimately, the home purchaser) of higher union wage rates would be marginal. It was indicated to those in attendance that the union's view was that the electrical contractors would not lose business as a result of becoming unionized.

78. During the course of the next day, Thursday, September 12, 1996, Andrew became aware, for the first time, that Local 353 was attempting to organize his business. Early that morning, Mr. Pezzutto arrived at the employer's shop in Downsview and spoke to Andrew. Mr. Pezzutto quite openly advised Andrew of the meeting held the previous night, of his support for Local 353, and then proceeded to have a discussion with Andrew regarding the benefits and drawbacks of unionization. I am satisfied that during this discussion Andrew suggested to Mr. Pezzutto that he ought to support "Local 183" (presumably a reference to the Labourers' Local 183) rather than Local 353, which he referred to as a "Mickey Mouse union".

79. Later that day, Andrew had further discussions with his employees regarding the union's organizing drive. As noted above, Andrew conducts daily visits of each work site for which he is responsible in order to deliver material, and to keep an eye on the progress at the worksite. While visiting one such site, Andrew and Mr. Art Campbell, a relatively long service employee of the company, agreed to have lunch together at a nearby Swiss Chalet. During the course of that lunch, Mr. Campbell told Andrew that Local 353 was organizing the employees of the company, and advised him that the two critical issues for the employees were the rate of pay and the need for a benefit program. As a pieceworker, the benefit issue was the most important one to Mr. Campbell. Andrew and Art both acknowledged in their testimony that the benefit issue was a concern to the employees.

80. This meeting was the genesis of the "\$50 per house" concept that pervaded much of the testimony before me. During the course of this lunch with Andrew, Mr. Campbell indicated his view that an across-the-board increase of \$50 per house (for both roughing in and finishing electrical work) would satisfy the employees, and he recommended that a meeting be held with all of the employees in order to discuss both the rate of pay and the issue of benefits. Andrew was prepared to meet with and listen to the men regarding these issues. Andrew indicated to Mr. Campbell that he could not promise to pay \$50 more per house at that time, but would see if he could get more money from the builders as soon as the employer's contracts were up for renewal. He also indicated to Mr. Campbell that if group benefits could be secured, the cost of obtaining such benefits would be less.

81. As noted above, the wages paid to employees of the company was a significant issue. It is, therefore, appropriate to review the wage structure, if it can be called that, of the employer's business. The testimony establishes that the employer's wage structure is somewhat haphazardly determined, based largely upon its contracts with builders, but also based on merit and the discretion of Andrew and Art. Once a bid made by the company is accepted by a builder, and a contract is signed, the company is "locked" into a pre-set fee payment for roughing in and finishing electrical work for each house of certain style on a subdivision. Accordingly, there is only so much flexibility that the employer has to provide its workers on those sites with increases in wages. In fact, the evidence establishes that between 1990 and 1994, wages and prices were generally depressed, and that since 1995 wages and prices have been increasing. The evidence also establishes that a majority of the employer's contracts with builders in 1996 were set to expire on December 31, 1996.

82. There can be no doubt that, on an almost daily basis, either or both of Andrew and Art fielded requests from employees of the company for increases in hourly wage rates or piecework rates. For the most part, these requests for pay increases are not met by the employer. The evidence establishes that the wage or piecework rates paid to the company's employees are quite modest for the industry as a whole, and Andrew quite frankly conceded that they are, but indicated that the business was cutthroat, that in order to obtain work the company's bids had to be competitive, and that to be competitive the

employer could not pay much more than it was paying. Historically, the employees of the employer were advised when requesting a wage increase that the company's hands were tied until its contracts were up for renegotiation, or a new contract was obtained at a higher price for the work.

83. The evidence establishes that, on occasion, builders will negotiate revised prices with the employer for electrical work to be performed on subdivisions. Whether this does or does not occur largely depends upon the length of the project, and the demand for electrical workers. That is, if the demand for electrical workers is high, and a project which had been anticipated to take 6 months extends for another 6 months, there is the possibility that a revised price schedule could be negotiated to reflect the market reality. However, it was the uncontradicted testimony of Andrew that price increases may also reflect an increase in the cost of materials, or the style of a home on a subdivision. Accordingly, merely because the builder provides an increase of, say, \$50.00 for each roughed in home does not mean that the company can pass all (or any) of the increase on to its employees.

84. When an individual becomes employed by the company, there is a relatively short (but by no means consistent) "probationary-type" period during which the company has the individual work with an experienced electrician to ensure that he can perform the work required. Once it is established that the worker can perform this work, he is offered a job at either an hourly rate or on a piecework basis. It is clear that at the outset of employment there is little information provided to employees regarding the basis upon which wage increases may be provided by the employer. However, I am satisfied that employees become aware quite soon after commencing employment with the employer that their wages are, to a large extent, "fixed" until the builder provides a better price to the employer for the work to be done.

85. When the employer obtains a contract to perform electrical work on a project, it will assign individuals to that project to complete the work required. According to Andrew, it is at this time that it is possible to increase the rate of pay for workers, because it is at this time that the employer can afford to do so, if the price for the work received from the builder has increased. The evidence indicated certain times when this had, in fact, occurred. That being said, it is also clear from the evidence that there is some flexibility in the employer, even mid-contract, because certain individuals have obtained merit increases during the course of a project, without a corresponding alteration in the price of the work. There was also evidence to suggest that the payment of gas money and/or the "rounding off" of dollar amounts was done on occasion to provide the workers with some increased compensation.

86. Returning then, to the events of September 12, 1996, on that same day Andrew also met with Mr. Farzam Gholampour, an hourly-rated employee of the company. I found Mr. Gholampour to be the most credible witness of the 15 who testified before me. Mr. Gholampour indicated that he sat down with Andrew and had a discussion with him regarding the pros and cons of unionization. The discussion was at the instigation of Mr. Gholampour, and was prefaced with a request that Andrew forget, for the moment, that he was Mr. Gholampour's boss, and that he, on that basis, engage in a discussion regarding the effect of unionization. Mr. Gholampour had attended at the previous night's meeting at the Travelodge and, for the first time, had considered the "economics of the situation". He desired to speak to Andrew about the economics in order to clarify his mind, and to make an informed decision. There is no dispute that Andrew and Mr. Gholampour have a good relationship and this undoubtedly explains why this discussion occurred as naturally as it did.

87. During the course of this discussion, Andrew indicated to Mr. Gholampour that it was his opinion that, if the union were to successfully organize the employer, the company would lose jobs because the unionized rates would be high compared with the rates then being paid to its employees. In cross-examination, Andrew stated that there was a wide-ranging discussion on the question of "supply and demand" for work, and that he indicated to Mr. Gholampour that work from builders was

determined exclusively by price. According to Andrew, Mr. Gholampour questioned him about price increases, and asked Andrew whether he agreed that price increases would mean less work for the company. In answer to this question, Andrew replied by saying “yes, that is going to happen”, and that an increase in price would cause the company to lose jobs.

88. This encounter was one of many in which Andrew and/or Art elaborated upon what was referred to, during the course of the hearing, as their “economic analysis” or “the economics of the situation”. The information that Andrew and Art communicated to various workers was, in essence, that which is described above with respect to Mr. Gholampour - that in the absence of the entire residential electrical contracting industry becoming unionized, which would not happen, the effect of the employer becoming unionized would be to reduce the ability of the company to successfully bid for work, because its bids for projects could be undercut by non-union contractors who would not be bound to any collective agreement. The “economic analysis” was buttressed, in this case, by the experience that Art had had when the company was previously organized in 1976. At that time, it will be recalled, the employer lost out on jobs (and employment was cut significantly) because it could not successfully under-bid other non-union competitors. Art stated in cross-examination that it was a “fact” that the employer could not meet the market prices if it were to become unionized. There is no dispute that this potential scenario was communicated, on a number of separate occasions, to a large number of employees of the employer.

89. Moving on, then, chronologically from September 12, 1996, Mr. Stevens and Mr. Speranza continued to organize the employees of the employer. While Mr. Stevens was out of town attending a union convention, Mr. Speranza continued to sign individuals to membership applications in Local 353. Upon Mr. Stevens’ return to work, it was decided by Messrs. Stevens and Speranza that the time was right to apply for certification, and accordingly on September 24, 1996 the union applied for certification. The union believed that it had approximately 66% support in the bargaining unit, but Mr. Stevens acknowledged in cross-examination that a few individuals properly on the voters list were unknown to the union and therefore that the support for the union (as reflected by signed membership applications) may have been only 60% at the time the application was filed with the Board.

90. A number of conversations regarding the union organizing and the issues of the rate of pay and the provision of benefits occurred between Andrew, Art, and various employees of the employer in the time period from September 13, 1996 to October 1, 1996. Some of these were subject to testimony in these proceedings. I outline these directly below. As a general proposition, Andrew testified that during the course of these discussions he did not make any promises, and never threatened anyone’s employment or attempted to influence anyone’s wishes. He testified that he was aware, at that time, that to promise his employees more wages could be seen to be “bribing” them, or an unfair labour practice. He attributed this knowledge, in part, to “common sense”.

91. Jason Murray testified that he had a discussion with Andrew at a worksite during which Andrew indicated to him that if he were to vote “no” to Local 353 the employer would be “the best paid, non-union company in the city”. Mr. Murray also testified that Andrew indicated that he would match the union rate. Andrew, during his testimony, denied that he had told Mr. Murray that he would match the union rate. Having considered all of the evidence, I am satisfied that Andrew did not, at any time, indicate to Mr. Murray that he would match the union rates in the industry. It is highly unlikely, given the nature of the industry and the position that the employer was then in (i.e. with a number of fixed contracts with specific wage rates built into the price of the work) that Andrew would ever make such a claim. However, I am satisfied that Andrew indicated to Mr. Murray that the employees would become “the best paid, non-union” workers in the city if the union were to be unsuccessful in its certification application.

92. It was Andrew's testimony that he told Mr. Murray that if the union were unsuccessful "we would be the largest independent electrical contractor I knew of". When this proposition was put to Mr. Murray in cross-examination, he quite forcefully maintained his initial testimony, which is consistent with Andrew's "economic analysis" referred to above. Andrew indicated in his examination in chief that he did have a discussion with Mr. Murray regarding the "economics of the situation". Mr. Murray testified that as a result of his conversation with Andrew "I figured we'd all get more money. I'd get more money out of it". I accept this testimony of Mr. Murray. The natural inference from Andrew's comment would be that the employees of the employer would benefit, wage-wise, from the ability of the employer to remain union-free.

93. It was also the testimony of Mr. Murray that he had discussions with Andrew regarding the issue of benefit coverage. However, in cross-examination it became quite clear that Mr. Murray could not recall whether these conversations occurred before or after the representation vote. Andrew testified that he did not have any discussion with Mr. Murray prior to the vote regarding the issue of benefits. To me, that seems highly unlikely, given that Andrew conceded in his testimony that the issue of benefits became more intense after Local 353 commenced its organizing campaign. Andrew also stated that he let two or three employees know, a few days before the representation vote, that Art and Mr. Lykos had a benefit plan, so that they would be aware that he would help them look into a plan. However, in the circumstances, given Mr. Murray's equivocal evidence regarding the timing of the discussions, I am not prepared to find as a fact that there was a representation made by Andrew to Mr. Murray prior to the representation vote regarding the issue of benefit coverage.

94. As noted above, most of the allegations of "on site" improprieties focused on Andrew's sites, and not Art's. However, in cross-examination Art conceded that prior to the representation vote he had had a conversation with three employees: John Facey, George Mouvrakis and Tony Bellasario. During that conversation, Art indicated to each of these employees that, when the builders renewed the company's contracts, he would get them \$30 or \$50 per house more, dependent upon the builder's prices.

95. I also heard testimony from Mr. Gus Kariotis regarding two particular discussions he had with Andrew prior to the representation vote. The evidence of Mr. Kariotis was not particularly helpful, not because he was in any way attempting to mislead me, but because it was evident that he could not recall the events in sufficient detail. He acknowledged that he could not remember the actual words used by Andrew. In the circumstances, I am not satisfied that I can rely on Mr. Kariotis' testimony, alone, to make findings of fact. However, Andrew made certain concessions in cross-examination which do permit me to make some findings with regard to these conversations.

96. The first conversation between Mr. Kariotis and Andrew occurred approximately one week before the representation vote. Andrew arrived at the site that Mr. Kariotis worked at quite late in the work day, and when Mr. Kariotis noted Andrew's tardiness, Andrew responded by indicating that he had been delayed because of "union problems". A discussion ensued during which Mr. Kariotis voluntarily disclosed to Andrew that he supported Local 353 and would vote in favour of unionization. Mr. Kariotis stated that he desired to be paid more and to receive benefits, and believed that Local 353 would get him more of both. Andrew questioned Mr. Kariotis as to what guarantees the union had to be able to make such a promise. Andrew acknowledged in his testimony that, before the end of the conversation, he had indicated to Mr. Kariotis that he would get for him "whatever I could get from the builders".

97. The second conversation occurred on Mr. Kariotis' worksite on October 1, 1996. At that time, Mr. Kariotis, who does not regularly visit the employer's shop, was told by Andrew of the representation vote scheduled for the next day. A further discussion occurred respecting the issue of

higher wages and benefits. Andrew noted to Mr. Kariotis that other pieceworkers had made reference to a figure of \$50 per house, and discussed it with him. Mr. Kariotis testified that, although he could not recall the exact words that Andrew used, he “got the meaning of what he said”, which he stated was that “we can get you more money”.

98. When testifying Andrew had a number of different rationales for raising this sum with Mr. Kariotis. His answers to queries from opposing counsel were evasive and non-responsive. Andrew stated that the sum was raised in response to the prior conversation - that he had believed that Mr. Kariotis had discussed that sum with other pieceworkers and “in no way did I want him to think that next week he would get \$50”. Elaborating, Andrew stated that he wanted to make it clear to Mr. Kariotis that \$50 per house could not be given to employees unless the builders accepted his bids. Later in his testimony, Andrew stated that in response to a question from Mr. Kariotis respecting how much of an increase in pay he could receive, Andrew said that the other pieceworkers had approached him about an increase of \$50 per house. In my view, it is evident that Andrew raised the concept of \$50 per house in order to reinforce with Mr. Kariotis that a wage increase was in the offing, and that it was, therefore, unnecessary to vote in favour of Local 353.

99. Mr. Pezzutto also testified at some length regarding two or three discussions he had with Andrew during the course of the days leading up to the representation vote. In my view, Mr. Pezzutto made *bona fide* efforts to testify regarding the events of late September and October, 1996. However, at times it became clear that his recollection of days and dates was not firm (he admitted same during his testimony), and, accordingly, I am hesitant to rely upon his testimony alone where the particular day or date is of significance to find facts which may lead to the conclusion that unfair labour practices have occurred. That being said, I accept, for the most part, Mr. Pezzutto’s recollection of the substantive events to which he testified. I should note here that, to a great extent, Andrew’s testimony contradicts that of Mr. Pezzutto’s. However, Andrew’s testimony was not internally consistent and this has caused me great concern.

100. An example of this difficulty is the “\$50 per house” issue. Mr. Pezzutto testified that Andrew told him that, when the employer’s contracts with builders were renewed in December, 1996, he could probably get Mr. Pezzutto an increase of \$50 per house. Mr. Pezzutto was quite firm about his recollection of Andrew’s representations in this regard. In reply evidence, Andrew was just as firm, testifying that Mr. Pezzutto had raised the number, not him, and that he had never told Mr. Pezzutto that he would get a \$50 per house increase. However, in his initial testimony, Andrew agreed in cross-examination that he stated to Mr. Pezzutto that “the guys are talking about \$50 per house”, and that “the possibility exists that I can get you \$50 per house”. In the circumstances, it is evident that Andrew did raise the number, and indicated to Mr. Pezzutto, at the very least, that the possibility existed that a \$50 per house pay increase could be obtained. On balance, I am of the view that Andrew likely indicated to Mr. Pezzutto that it was “probable” that such an increase could be obtained.

101. It was Mr. Pezzutto’s testimony that Andrew commented to him during one of their discussions at the shop that, should the union succeed in the representation vote, he would have more spare time, would take up golf, and play a few rounds of golf each day. Andrew denied ever making that statement. Having considered the overall credibility of the two witnesses, I am satisfied that Andrew did, in fact, make the statement regarding golf to Mr. Pezzutto, and that he did so in reflection of his view that the success by Local 353 in the organizing drive would lead to less work for the employer. I am satisfied, on the basis of the testimony of Mr. Pezzutto, that he did not take the comment to be particularly threatening. Nonetheless, I accept that Andrew uttered the comment.

102. A number of employees testified that Andrew expressed, to each, that they ought to reject Local 353 at this juncture, and wait and see what happened in the broader industry. Most of the

employees who testified to such a comment stated that Andrew made the comment to them individually. Mr. Gholampour testified to that effect, but also stated that Andrew made a similar comment to those in attendance at a meeting of employees on October 1, 1996. Andrew denied this. It was Andrew's testimony that he was asked on a number of occasions by employees what would happen if Local 353 were to lose the representation vote, and that he responded by indicating that the Act barred the union from reapplying for certification for one year. He had learned this at the electrical contractors meeting in August, 1996.

103. Having regard to the testimony referred to above, particularly that of Mr. Gholampour and Mr. Campbell (the latter having been called on behalf of the employer), I am satisfied that Andrew communicated to the employees that they had an option - to vote against the union, and to see what would happen in the upcoming year during which Local 353 would be barred from further organizing the employer. This comment meshes rather nicely with the "economic analysis" engaged in by both Andrew and Art - that if the entire industry were to be organized, then they would not be averse to union rates. By waiting a year, the employees could see how other companies fared in a unionized atmosphere, and then choose for themselves what they desired to do. I note here that when it was put to Andrew in cross-examination that one employee, Mr. Murray, took that message from Andrew's comments, he conceded that it was possible that Mr. Murray may have derived that from what had been said.

104. Finally, there was quite a bit of testimony regarding a discussion amongst Mr. Pezzutto, Mr. Ershadi, and Andrew, at the employer's office, in which they calculated the cost of "going union" and determined how much effort would be required to earn the same amount of compensation on a piecework basis under the then-current rates. It was Mr. Pezzutto's testimony that this discussion occurred prior to the representation vote. Mr. Ershadi and Andrew both recalled that it occurred after the representation vote had been taken. I am of the view that it is impossible, based on the evidence before me, to conclude that the discussion occurred prior to the vote, as was urged by counsel for Local 353. As noted above, I do not accept Mr. Pezzutto's recollection of days and dates. He is the only individual who recalled that this event occurred prior to the representation vote. In the circumstances, therefore, I cannot conclude that this event occurred prior to the vote. I should note here that this conclusion does not have any great ramifications for the result of this decision, one way or the other.

105. The representation vote in the certification proceeding had been tentatively scheduled by the Board for October 2, 1996. However, it was administratively impossible to effect the vote on that day, and a Board Officer contacted the parties late in the day on October 1, 1996 to advise that the representation vote would be delayed one day to October 3, 1996. This notice did not come to the attention of the employer until early in the day on October 2, 1996.

106. Prior to the representation vote, the employer determined that it was going to hold a meeting of employees to discuss both work-related issues and, as Andrew referred to it in testimony, "the union questions or the questions regarding benefits or increases in pay that people were looking for". A number of employees had indicated to both Art and Andrew that they wanted such a discussion. It is evident though, and was not denied by Andrew, that the decision by the employer to have this meeting the night before the scheduled representation vote was not a coincidence. I am satisfied that there were many "work-related" issues facing the employer, including the recently implemented Ontario Hydro chargebacks, the workmanship at the sites, and the need for electricians performing the roughing-in electrical work to identify the wiring more clearly in homes. However, a number of the issues discussed at the meeting had been issues for weeks, if not months, and had not warranted a meeting before the application for certification and Board-directed representation vote. In fact, some of the employees who did not attend the October 1, 1996 meeting were not immediately given the same work-related

information imparted to those in attendance at the meeting. It is clear that the upcoming representation vote scheduled for October 2, 1996 was *the* critical driving factor behind the timing of this meeting.

107. There was curious evidence regarding the list of invitees for this meeting. The evidence establishes that by Monday, September 30, 1996, it had been determined by the employer to hold the meeting on the evening of the next day, Tuesday, October 1, 1996. The employees were requested by Andrew, Art, or other employees already invited to the meeting to gather at the shop on October 1 at approximately 6:00 to 6:30 p.m. Andrew testified that he advised the employees who worked on his sites (west of the GTA) of this meeting and invited them to attend. There is no doubt that the meeting was not compulsory and that some employees indicated that they could not attend. However, Andrew testified that the importance of the meeting was communicated to the employees. Rather curiously, though, Mr. Pezzutto, who worked on a site supervised by Andrew, was not invited by Andrew to this meeting.

108. Mr. Pezzutto saw Andrew on September 30, 1996, and as he had not been personally invited to the meeting by Andrew (but had become aware of it through a conversation with another employee), he asked Andrew if the meeting was still on at the shop. Andrew responded by saying "well, I was thinking of having one, but I'm not going through with it". As a result of that comment, Mr. Pezzutto believed that the meeting was no longer scheduled, and did not pursue the issue.

109. The next day, October 1, 1996, Andrew and Mr. Pezzutto spoke by telephone late in the afternoon. I am satisfied that Andrew asked Mr. Pezzutto during this conversation if he could be talked out of supporting Local 353. Mr. Pezzutto replied by stating that nothing could change his mind. At the end of the conversation, Mr. Pezzutto volunteered to bring into the shop some work orders he had in his possession. Andrew suggested that Mr. Pezzutto bring them in to the office on October 2, 1996. Mr. Pezzutto was suspicious because the employer generally requests that the work orders be brought into the office by month end. Accordingly, he made the short two mile drive to the shop from his home at about 5:30 p.m. to bring in the work orders. When he arrived at the shop, Andrew, Art, and two employees were there. Mr. Pezzutto asked Andrew if a meeting was about to take place and Andrew responded by saying "I don't know", noting that two employees were at the shop at the time. Andrew took the work orders from Mr. Pezzutto and said to him "I'll see you tomorrow". Mr. Pezzutto thereupon left the shop.

110. Later that evening Mr. Pezzutto was contacted by an employee who had attended at the meeting and was advised that the meeting had gone ahead. Mr. Pezzutto was, in his own words, "stunned" that a meeting had occurred, and that he had not attended. According to Andrew, he was not really sure that the meeting was going to proceed, because at 5:30 p.m., when Mr. Pezzutto arrived at the office, only 2 employees had arrived for the meeting. As it turned out, a number of others showed up after 6:00 p.m., and by 7:00 p.m. approximately 10 employees went to the restaurant across the street for the meeting.

111. Andrew's testimony regarding the lack of an invitation to Mr. Pezzutto for this meeting was entirely unsatisfactory. His testimony was to the effect that he really did not know, even as late as 5:30 p.m. on the day of the meeting, that this meeting would proceed. I do not believe that testimony. In my view, it was evident that Andrew did not know what type of turnout he was going to have at the meeting, but there could have been no doubt, based on his broadly communicated invitation, that most of the employees of the employer were aware that a meeting of employees was to occur that night, and that Andrew anticipated that one would occur.

112. Andrew specifically denied an intention to exclude Mr. Pezzutto from this meeting. He was clearly not telling the truth in this regard. Andrew was fully aware of Mr. Pezzutto's desire to attend the meeting of employees. The prior day, while he was inviting employees of the employer to attend at a

meeting the subsequent evening, he indicated to Mr. Pezzutto that he did not believe that such a meeting would be held. Once the requisite number of employees had gathered on October 1, 1996 to warrant a trip across the street to a restaurant for the meeting, Andrew did not bother to pick up the telephone to call Mr. Pezzutto, who he knew lived minutes away from the shop. Andrew could not satisfactorily explain why he did not invite Mr. Pezzutto to the shop for the meeting when it became clear that a sufficient number of persons had arrived to warrant a meeting. The answer to that question is quite obvious - he did not want Mr. Pezzutto there. Art noted in his testimony that Mr. Pezzutto was "one of the leading forces" in favour of Local 353. Andrew was well aware of this.

113. Counsel for Local 353 made a similar assertion respecting Mr. Kariotis - that he, too, was not invited to this meeting. Mr. Kariotis testified that he did not know that there had been a meeting at the office until preparing to give testimony in these proceedings. Andrew's testimony on this issue was also unsatisfactory. In chief, he at first asserted that he could not specifically recall inviting Mr. Kariotis, but "believed" that he had because he had not excluded anyone from the meeting. In reply testimony, after Mr. Kariotis had testified to the contrary, Andrew's memory improved because he then specifically recalled telling Mr. Kariotis of the meeting during their second conversation; that is, on the day before the vote. Art Campbell testified in reply evidence that he had discussed "a meeting at the shop" with Mr. Kariotis, though he conceded that the nature of the meeting had not been raised in that discussion. However, this testimony was never put to Mr. Kariotis when he was on the stand. I am not satisfied that Mr. Campbell had such a discussion with Mr. Kariotis. For reasons outlined above, I do not consider Mr. Campbell to have been a particularly credible witness.

114. Taking everything into account, I am satisfied that Mr. Kariotis was excluded from the meeting in the same way that Mr. Pezzutto was. Andrew was well aware of Mr. Kariotis' support for Local 353. In my view, he did not invite Mr. Kariotis to the October 1, 1996 meeting for the same reason that he did not invite Mr. Pezzutto - he did not desire that committed union supporters attend at that meeting.

115. The meeting of October 1, 1996 lasted for approximately two to three hours. In attendance were Andrew, Art, and a number of employees, consisting of Art Campbell, Farzam Gholampour, Kirby Smith, Paul Messam, Nick Lykos, Shirley Scott, Art Lauzis, George Mouvrakis, Hamid Kangarloo, and John Facey. Mr. Scott's son also was in attendance, although he is not an employee of the employer. There is no dispute that the first half of the meeting - roughly - was consumed by a discussion of work-related issues not related to the union's organizing campaign. At one point, the discussion turned to the labour relations matters, and a relatively lengthy discussion regarding the issues earlier identified to Andrew by Mr. Campbell (namely the need to increase wages and to establish benefits) occurred. There was some controversy regarding who introduced the labour relations matters to the discussion, but I do not see any need to resolve that question.

116. Messrs. Campbell, Gholampour, Messam, Lykos, Lauzis, Kangarloo and Facey testified regarding their recollection of the meeting, as did Andrew and Art. Each had a different perspective on what was stated at the meeting. Determining what was said, and by whom, is complicated by the fact that 13 people attended this meeting, and that they sat in such a manner that individuals at one end of the grouping of tables could not necessarily hear what was said at the other end of the tables. Furthermore, some of the attendees acknowledged that they did not pay attention to all that was discussed. Some of the individuals left the meeting early; one of the attendees excused himself for approximately one-half hour to go to the bar.

117. However, some things are undisputed. Both Andrew and Art discussed with those in attendance their "economic analysis" which I have outlined in greater detail above. Andrew testified that he used the meeting to reiterate to the employees what he had advised them previously - that "after

the contracts are over, what the builders give me will be given out. I can only work with what I have". Messrs. Gholampour, Kangarloo, Facey and Messam each testified that Andrew made comments to the same effect. The fact that most of the employer's contracts with the builders were up for renegotiation on December 31, 1996 was noted. There was also a discussion regarding the previous certification of the employer in 1976. Andrew testified that he was sure that Art had "made a point" that in 1976 the work of the employer slowed down after Local 353 had become certified. In fact, Art conceded in cross-examination that it was stated at the meeting that more work could be obtained by the company, and more money would be received by the employees, if the employer remained non-union.

118. There was also a discussion regarding the implementation of a benefit plan. Consistent with every other piece of evidence in these proceedings, each worker took something different from the meeting with regard to the benefit program discussion. I am satisfied that neither Andrew nor Art undertook at this meeting to implement an employer-paid benefit plan for their employees. However, it is clear that Andrew indicated to the employees that benefit plans other than that provided by Local 353 existed, that group rates were more economical than individual ones, and that he undertook to call the Ontario Electrical League and have an insurance salesperson attend at the shop later in the week to discuss the possibility of implementing a group insurance plan with the employees. A number of the attendees at the meeting had the impression that Andrew and Art had agreed to pay for the benefit plan. Andrew and Art denied that they had promised to pay for the plan, and, as noted above, I am satisfied that they never promised to do so. However, I do not doubt the veracity of those who stated that they believed otherwise.

119. Those in attendance expressed their views as to the need to have a union as their bargaining representative. Some discussed (in varying degrees of detail and accuracy) their previous experiences in unionized workplaces, or the experiences of friends. Near the end of the discussion at the table, each individual in attendance was invited to express what he had to say about the situation. Some individuals made comments of a somewhat profound nature, others indicated in different degrees of strength that they did not support the union, and one or two did not say anything. Not surprisingly, there was no one who spoke in favour of the union at this gathering. The meeting then broke up. I note here that Local 353 asserted in its pleading that one of the employees, Mr. Lauzis, chanted "no union, no union", in an audible fashion, at the end of the meeting. Most of the individuals who testified denied hearing such a comment, and Mr. Lauzis denied making such a comment. Mr. Gholampour was quite firm in his recollection that he heard Mr. Lauzis utter the words, quite loudly, and having regard to the credibility of the witnesses, I am satisfied that the words were, in fact, said by Mr. Lauzis. However, I do not believe that much turns on those words at the end of the day, for I am satisfied that neither Andrew nor Art heard the comment.

120. The next event of significance occurred early in the morning of October 2, 1996. As noted above, the Board cancelled the vote that was tentatively scheduled for October 2, 1996, late in the day on October 1, 1996. Mr. Stevens and Mr. Speranza, who had received a telephone message from the Board, were somewhat suspicious of the call and felt it best to attend at the shop where the vote was to be held. Early in the morning on October 2, 1996, therefore, they attended at the employer's shop and discovered that the vote had, in fact, been cancelled.

121. While standing with Mr. Pezzutto behind the shop, where three to five men were loading up their vehicles, Messrs. Stevens and Speranza engaged Art in small talk. There was a brief discussion regarding a former Local 353 organizer, Bill Jackes. At the end of this discussion, Art expressed, out loud, and in a very animated way, the following statement: "a vote for the union is a vote for early retirement". Each of Mr. Pezzutto, Mr. Speranza and Mr. Stevens testified that he heard this statement. Although it would appear that the employees loading up their vehicles were within 50 feet of Art, none of those employees testified that he had heard the comment made by Art.

122. Art testified that he had, in fact, made a comment regarding his own possible retirement in response to a reference by Mr. Speranza to the retirement of Mr. Jackes (who is, to the knowledge of Mr. Speranza, in fact deceased). Art's testimony was not credible on this point and I reject his testimony. I am somewhat concerned that Mr. Stevens did not produce a note which Mr. Speranza testified had been created by Mr. Stevens at the time that Art made the above-noted comment. No explanation for the absence of the note was offered during testimony. However, I am nonetheless satisfied that Art made the comment attributed to him by Messrs. Pezzutto, Stevens and Speranza, and I so find.

123. Counsel for Local 353 wrote to the Board on October 2, 1996, prior to the taking of the representation vote, and advised that, as a result of the comments made by Art, and other unfair labour practices, the union would be relying upon section 11 of the Act in support of its application for certification. The unfair labour practice complaint before me was filed with the Board on October 11, 1996. It was not until after that proceeding was served on the employer that Andrew retained his current counsel. Prior to that time he had not obtained any legal advice.

124. The representation vote was taken by the Board on October 3, 1996. After the completion of the balloting, the ballots were counted, and Local 353 was unsuccessful in its application by a vote of 5 in favour of the applicant, and 10 against. Two ballots were segregated and not counted. Andrew contacted Mr. Pezzutto that evening and advised him of the results of the balloting. During that same conversation, Andrew indicated to Mr. Pezzutto that if he wished to remain working for the employer, he was perfectly free to do so, but if he would prefer to work for a unionized employer, Andrew could help him find such a position.

125. On the evening of October 3, 1996, five or six employees of the employer met with a representative of the Ontario Electrical League at the employer's shop regarding the implementation of a benefit program. Andrew had contacted the Ontario Electrical League on the previous day, and the League had agreed to send one of its representatives to the shop to discuss its benefit program on the evening of October 3. The program proposed by the League was a group program funded by the employees themselves. The evidence establishes that this plan has not been picked up by the employees because of the cost, which appears to be approximately \$80 per month for each of the employees.

126. The parties stipulated, as a fact, that as at February 26, 1997 there had been a tentative collective agreement reached between the International Brotherhood of Electrical Workers and the Electrical Contractors Association of Ontario covering electrical contractors in the residential sector of the construction industry subject to bargaining rights held by Local 353. The Electrical Contractors Association of Ontario is an accredited employer bargaining agency for the purposes of the Act.

127. During the course of evidence, Andrew indicated that the employees of the employer were concerned in the fall of 1996 with job security, in the sense that work in this sector of the construction industry tends to be cyclical and slows down over the winter. Andrew indicated that every employee has expressed a desire to work the entire year without interruption or layoff.

(c) Decision

128. Section 11(1) of the Act provides as follows:

11(1) Upon the application of a trade union, the Board may certify the trade union as the bargaining agent for the employees in a bargaining unit in the following circumstances:

1. An employer, employers' organization or person acting on behalf of an employer or employers' organization has contravened the Act.
2. The result of the contravention is that a representation vote does not or would not likely

reflect the true wishes of the employees in the bargaining unit about being represented by the trade union.

3. No other remedy, including the taking of another representation vote, is sufficient to counter the effects of the contravention.
4. The trade union has membership support adequate for the purposes of collective bargaining in a bargaining unit found by the Board to be appropriate for collective bargaining.

It is evident from the language contained in section 11(1) of the Act that all four of the above circumstances must be established before the Board can certify a trade union pursuant to this section of the Act. I note here that the parties were in agreement that the fourth condition - that the trade union have adequate membership support for the purposes of collective bargaining - existed on the facts of this proceeding. Accordingly, I will not address that factor.

129. It is a trite principle of law that certification pursuant to section 11(1) of the Act - commonly referred to as “automatic certification” - is an extraordinary remedy and one which ought to be applied by the Board cautiously.

130. As noted by the Board in the recent decision of *Maverick Mechanical Contractors Limited*, [1996] OLRB Rep. Apr. 289, at paragraph 25, the Board has, generally, granted automatic certification in two broad categories of cases. Where an employer has made threats to the continued job security of its employees, conditional upon whether the union succeeded in its attempt to become certified, the Board has historically certified that union pursuant to section 11 of the Act (or its predecessors). Alternatively, the Board has certified a union automatically where a range of unlawful employer activities, none of which taken separately would lead to automatic certification, has the cumulative effect of undermining the confidence in the rule of law which a reasonable employee is presumed to have and which gives a reasonable employee the confidence to make a free choice.

131. In either of these two scenarios, it is well established that the remedy of “automatic certification” is not to be utilized by the Board in a punitive manner, but rather is a remedial option provided to the Board to ensure that an employer is not rewarded for its misconduct during a union organizing campaign. The legislature has recognized that it is inappropriate to permit an employer, through its own violations of the Act, to eliminate any chance that the true wishes of its employees could be reflected by way of a representation vote. Where the employer has acted in such a manner, the Act provides the Board with the power to automatically certify the union as the bargaining agent of the employees in the bargaining unit determined to be appropriate by the Board - whether the union would or would not otherwise have been successful in the absence of the unlawful conduct of the employer.

132. At the outset, it is important to keep in mind a number of realities that the Board considers important in this type of proceeding. First, the Board appreciates that in many of these cases - this one being no different - there is a delicate balancing to be achieved between the freedom of employees to choose whether they desire a trade union to represent them in their relations with the employer, and the statutorily-protected (but limited) freedom of the employer to “express views”. It is often not easy to balance these two freedoms in a manner which is acceptable to everyone. However, over time, a large body of Board case authorities has developed which can help guide the labour relations community in determining the appropriate balancing of these competing freedoms.

133. It is also kept in mind by the Board that this balancing of freedoms is done in the unique context of the workplace, where there is, on the one hand, an employer, and on the other hand, employees. It is a reality that in many if not most workplaces the employees are (and know themselves to be) vulnerable to the authority of their employer. This reality is not lost on the Board, and is always

kept in mind when considering the appropriate remedy in certification applications when section 11(1) of the Act is relied upon.

134. With this background in mind, I consider the application of section 11(1) of the Act to the facts of this case.

135. Do the facts of this proceeding, as determined above, establish that unfair labour practices have been committed by the employer? Counsel for the employer, during the course of argument, suggested that the employer had conducted itself very close to the line, and perhaps “one foot” over the line at times, but not in any significant way. I disagree. In my view, the employer crossed well over the proverbial “line”, on numerous occasions.

136. I start by observing that I do not believe that the employer has violated the Act by way of soliciting employee grievances or problems, as reflected by the decision of *The Globe and Mail Division of Canadian Newspapers Limited*, [1982] OLRB Rep. Feb. 189. Counsel for Local 353 submitted that the evidence established that the employer sought out grievances in order to resolve same, so as to demonstrate that there was no need for union representation of the employees of the company, contrary to section 70 of the Act. In my view, the evidence does not establish that either Art or Andrew made such inquiries of employees. The evidence establishes only that Andrew became aware of the two overriding issues - the low wage rates and the need for benefits - immediately upon the advent of the union’s organizing campaign, through Mr. Campbell, who advised him of same. There was no evidence to suggest that Andrew questioned Mr. Campbell for that information; in fact, the evidence is clear that it was Mr. Campbell who volunteered the information to Andrew. In these circumstances, I am unable to conclude that the employer has violated section 70 of the Act.

137. What the employer did with the information it was provided by Mr. Campbell is more troubling. Sections 70, 72(c) and 76 of the Act provide as follows:

70. No employer or employers’ organization and no person acting on behalf of an employer or an employers’ organization shall participate in or interfere with the formation, selection or administration of a trade union or the representation of employees by a trade union or contribute financial or other support to a trade union, but nothing in this section shall be deemed to deprive an employer of the employer’s freedom to express views so long as the employer does not use coercion, intimidation, threats, promises or undue influence.

72. No employer, employers’ organization or person acting on behalf of an employer or an employers’ organization,

- (c) shall seek by threat of dismissal, or by any other kind of threat, or by the imposition of a pecuniary or other penalty, or by any other means to compel an employee to become or refrain from becoming or to continue to be or to cease to be a member or officer or representative of a trade union or to cease to exercise any other rights under this Act.

76. No person, trade union or employers’ organization shall seek by intimidation or coercion to compel any person to become or refrain from becoming or to continue to be or to cease to be a member of a trade union or of an employers’ organization or to refrain from exercising any other rights under this Act or from performing any obligations under this Act.

138. It is evident from a review of section 70 of the Act that it is an unfair labour practice for an employer to promise its employees something during the course of an organizing drive as part of its expression of views regarding unionization. Such promises are considered to be an interference with the selection of a trade union, if they are in any way motivated by a desire to undermine the trade union. The evidence establishes in this case that the employer made numerous promises to its employees during the course of the union’s organizing campaign. The promises were clearly motivated by the

union's organizing campaign, and were an attempt to undermine the union's position. It was submitted during the course of argument by counsel for the employer that neither Andrew nor Art promised anything to the employees because, although the figure of \$50 per house was bandied about, neither Andrew nor Art actually ever uttered a firm promise that a raise of \$50 per house would be provided to an employee. A similar submission was made with respect to the issue of benefit coverage; that is, it was argued that the employer never promised to pay for benefit coverage, and therefore that no promise had been made by the employer.

139. Again, I disagree. Dealing first with the question of a raise in the rate of pay, I am quite satisfied, on the testimony before me, that Andrew and Art both promised the employees of the employer a pay raise should the union not be successful in the representation vote. It may well be that Andrew did not tell the employees that they would each receive a \$50 per house raise if the union were unsuccessful. What he clearly did say, though, was that when he re-negotiated the contracts with his builders, within the next three months, he would provide at least part of any increased amounts negotiated with those builders to the employees. That much is clear and was communicated to the employees on numerous occasions, including the meeting of October 1, 1996. I am satisfied that it was the intention of both Art and Andrew to communicate to their employees that raises would more likely than not be provided at the end of 1996 or early 1997. It should be kept in mind that these comments were made in a rising housing market, where it could reasonably be anticipated that the employer could negotiate an increased contract price with its builders, and that the comments were made to employees who were, on an almost daily basis, looking for *any* signs of a future wage increase. These representations to employees are clearly "promises" for the purpose of section 70 of the Act, and in the circumstances described above the making of those promises violates that same provision.

140. The same comments apply to the employer's offer of benefit coverage which was made to and discussed with various employees prior to the time of the representation vote. I am satisfied that Andrew and Art never promised both to obtain and to pay for benefits for their employees, although it is evident that they wanted that impression to be conveyed to their employees, and it was, in fact, so conveyed. Nonetheless, it is clear that Andrew explicitly promised to set up a meeting with a representative of the employer's benefit administrator, and that he communicated to the employees that a better rate could be achieved for everyone if a group of employees contracted for benefits, as contrasted to individual benefit coverage. In making these representations - to facilitate group coverage at group coverage rates through the employer's benefits administrator - the employer made "promises" to employees in an attempt to undermine the union, and violated section 70 of the Act.

141. The decision which was consciously made by Andrew to not invite Mr. Pezzutto and Mr. Kariotis to the October 1, 1996 employees' meeting also constitutes a violation of section 70 of the Act, insofar as it is evident that Andrew desired to exclude two vocal union supporters from a meeting where the question of the relative benefits of unionization would be discussed. Those two workers were excluded from the meeting because of their support for Local 353. They were excluded in order to ensure that there would be no dissenting opinion from Andrew's and Art's at the meeting. This conduct constitutes interference with the selection of a trade union, and is an unfair labour practice, contrary to section 70 of the Act.

142. The evidence establishes further unfair labour practices committed by both Art and Andrew. As noted earlier, I am satisfied that Andrew suggested to Mr. Pezzutto that he support "Local 183" rather than Local 353. This is a violation of section 70 of the Act. It is also clear that both Andrew and Art made certain threats in the presence of Mr. Pezzutto. I am satisfied that Andrew suggested to Mr. Pezzutto that the success of Local 353 would give him the opportunity to take up more golf in the future. This not too subtle suggestion that work would slow down if Local 353 were successful was clearly a threat to Mr. Pezzutto's employment, and therefore a blatant violation of sections 70, 72(c)

and 76 of the Act. Art's comment at the rear of the shop that "a vote for the union is a vote for early retirement" is also an unfair labour practice as it too is a threat to Mr. Pezzutto's employment, and clearly violates sections 70, 72(c) and 76 of the Act.

143. Most significantly, I am of the view that the employer has further violated sections 70, 72(c) and 76 of the Act by intimidating or threatening its employees with respect to their job security. I have reached this conclusion only after a great deal of consideration of the employer's argument, which I outline below.

144. The employer argued that it was not, during the discussions of its "economic analysis" with its employees, threatening or intimidating them, but rather was truthfully discussing with its employees the factual consequences of unionization. It will be recalled that the employer's previous experience with Local 353 representation of its employees was a significant slowdown in job opportunities. It was submitted by counsel that the employer was merely telling its employees a factual, objective truth; that is, that unless the entire electrical contracting industry in the Toronto area were to become unionized, the result of the company becoming unionized would be an inability to compete, price-wise, with the employer's competitors, and a subsequent loss of job opportunities, and therefore jobs.

145. This argument is superficially attractive. I invited the parties to comment on the decision of the United States Supreme Court in *N.L.R.B. v. Gissel Packing Co.*, 71 LRRM 2481 (1969). In that case, the Court had occasion to comment, amongst other things, on the extent to which an employer could freely speak during the course of a union organizing campaign. At pages 2497 and 2498, the Court made the following observations:

Thus, an employer is free to communicate to his employees any of his general views about unionism or any of his specific views about a particular union, so long as the communications do not contain a "threat of reprisal or force or promise of benefit". He may even make a prediction as to the precise effects he believes unionization will have on his company. In such a case, however, the prediction must be carefully phrased on the basis of objective fact to convey an employer's belief as to demonstrably probable consequences beyond his control ...

In carrying out its duty to focus on the question "what did the speaker intend and the listener understand" ..., the Board could reasonably conclude that the intended and understood import of that message was not to predict that unionization would inevitably cause the plant to close but to threaten to throw employees out of work regardless of the economic realities. In this connection, we need go no further than to point out (1) that petitioner had no support for his basic assumption that the union, which had not yet even presented any demands, would have to strike to be heard, and that he admitted at the hearing that he had no basis for attributing other plant closings in the area to unionism; and (2) that the Board has often found that employees, who are particularly sensitive to rumours of plant closings, take such hints as coercive threats rather than honest forecasts.

146. I also entertained counsel's submissions on the analysis previously provided by the Board in *Vogue Brassiere Incorporated*, [1983] OLRB Rep. Oct. 1737. In that decision, the Board had occasion to comment on the latitude provided to employers to express their wishes during the course of a union organizing campaign. The Board made the following observations:

35. In summary, an employer is free to express opposition to a union, to comment about wages, benefits, exclusivity and union security, to describe the law and, within limits, to exaggerate and mislead. These activities are protected by the free speech proviso in section [70] and do not constitute an unfair labour practice.

36. But an employer who raises the spectre of a loss of jobs incurs a significant risk of running afoul of the law...

37. ... Many employers, are concerned about the impact of collective bargaining on compensation and efficiency. They may project a drop in profits production and jobs, as a result of unionization. Although this course of action is sometimes called a threat, it is very different than the classic management threat described above. An employer who muses aloud about the relationship between unions and jobs is not proposing - and is not understood by employees to be proposing - to voluntarily terminate jobs if forced to deal with a union. Rather, management is speculating that economic forces beyond its control will compel it to layoff employees if they embrace collective bargaining. The difference between the employer who threatens and the one who predicts is like the distinction between the extortionist who demands protection money and the doomsaying insurance agent who extracts a large fee by overestimating the risk of fire. Neither the speculating employer nor the insurance agent has threatened retaliation. The only possible cause for concern with the insurance agent is misrepresentation of present fact - i.e., statistics on fire frequency. But the employer has made a prediction about the future rather than a statement of present fact.

38. Predictions about the impact of collective bargaining on job security, made in the abstract during an organizing campaign, have almost invariably been held to be unlawful. In most cases, the reference to future employment was indirect or veiled, but the Board has not been hesitant to read between the lines ...

41. Not all remarks about future employment are made in the abstract. A good example is an employer's comment on its ability to pay the rates set out in a standard agreement. ...

42. Why does the Board scrutinize statements about future job loss so carefully? An employer's predictions about job security exert a large influence over employees. An employer is in a much better position than employees, and usually a union also, to know about the economics of an enterprise and an industry. Consequently, there is no effective check on the reliability of management statements on job security, as there is on topics such as wages paid by competitors. More important, comments about future employment strike at the heart of the most critical employee interest. A limitation on predictions made during an organizing campaign would shield employees from management influence. But might this approach also unduly restrict an employer's freedom of speech and deprive employees of valuable information?

43. A discussion of free speech in relation to job security should also recognize that a certification campaign is only the first step in the collective bargaining process. Because the union typically has not tabled its bargaining proposals at this stage, the impact of unionization is highly uncertain, and an employer may be inclined to fear the worst. There is a built-in incentive for an employer to overstate its concerns - particularly in relation to production levels and the associated number of jobs - when making predictions in the abstract.

147. As noted above, it was the argument of counsel for the employer that Art and Andrew's "economic analysis" was founded on legitimate grounds and not speculative. Historical experience of the employer was that unionization caused a loss of job opportunities because of an inability to compete on the basis of price. In the event that the employer were to be unionized, but not the entire electrical contracting industry, it would be impossible to compete with the employer's non-unionized competitors, where price is the critical factor determining bidding success. It was submitted that if Local 353 desired to dispute the historical record, it ought to have called evidence to challenge the "economic analysis". Counsel for Local 353 disagreed. In her submission, the "economic analysis" entered into by Art and Andrew was entirely speculative and without objective foundation, and clearly violated the Act.

148. In my view, the employer's argument must fail. It was entirely appropriate for the employer to comment on issues such as wages, benefits and competitiveness during the course of this organizing campaign, as long as it did not comment in such a way as to promise, threaten, coerce, intimidate or unduly influence its employees. Because of the highly sensitive nature of the concept of competitiveness, and its connection to job security, great care must be taken in how an employer comments on that issue. As noted by the Board in paragraph 36 of *Vogue Brassiere Incorporated*, cited above, "an employer who raises the spectre of a loss of jobs incurs a significant risk of running afoul of the law". In order to ensure that it does not violate the Act, the employer must not make predictions regarding the

impact of unionization in the abstract or that are speculative in nature. Any such prediction must be, as noted in the *Gissel Packing Co.* case, carefully phrased, be made on the basis of objective fact, and reflect the employer's belief regarding the demonstrably probable consequences of unionization. In my view, this is where the employer erred in its communications with its employees.

149. On the facts of this particular case, the prediction made by Art and Andrew regarding the inevitability of lost job opportunities and jobs upon the advent of the employer's unionization was speculative in nature. At the time that the predictions were made by Andrew and Art to various employees in the workplace, they had no idea what wage rate or compensation package would be requested by the union in its bargaining demands. In fact, Andrew admitted same during cross-examination. When it was put to him that Mr. Gholampour recalled Andrew as saying, on September 12, 1996, that it was his opinion that the unionized wage rate was too high, and that jobs would be lost as a result, Andrew responded thusly:

"My personal opinion? At the time? With Farzam, I had no idea of the rates to be discussed. I did not see the [union's] literature until close to the vote date. This conversation with Farzam was in mid-September."

It is clear that, as Andrew was discussing his "economic analysis" with his employees, including Mr. Gholampour on September 12, 1996, he was unaware of the wage demands that the union would be making at the bargaining table. His comments were entirely speculative, premised upon an assumption that wage rates and benefits would increase significantly. There was no factual basis for the comments. The observations made by Andrew and Art do not reflect an objective analysis of demonstrably probable consequences of unionization, but were speculative in nature. In fact, it was not until late February, 1997 that a tentative revision to an existing collective agreement was reached between the I.B.E.W. and the Electrical Contractors Association of Ontario.

150. Just as importantly, though, there is another reason that leads me to conclude that the discussion of the employer's "economic analysis" with employees constitutes an unfair labour practice. Irrespective of the truth of the statements made by both Andrew and Art, I am of the view, on the basis of all of the evidence before me, that the primary motivating factor which led both Andrew and Art to engage in this discussion with their employees was *not* to express their views upon what they believed to be an accurate assessment of the probable consequences of unionization, but rather was to intimidate, threaten and coerce their employees so as to undermine support for Local 353. The analysis of Andrew and Art may well be true. However, it is evident to me, on the facts of this case, and particularly in light of Andrew's acknowledgment that year-round security of employment was a concern of his employees, that their comments were primarily motivated by a desire to intimidate, threaten and coerce, rather than to comment and inform. That this is in fact so is amply supported by the other inappropriate (and unlawful) comments made by Andrew and Art in the time period leading up to the representation vote. The discussion engaged in by Andrew and Art goes well beyond the concept of "electioneering" which was relied upon by employer counsel. Accordingly, the numerous comments made to their employees regarding the loss of employment consequent upon unionization are violations of sections 70, 72(c) and 76 of the Act.

151. I have concluded that the first element required to apply section 11(1) of the Act - the commission of unfair labour practices - has been established. Moving on then, to the second inquiry that I am required to make, is the result of the contraventions of the Act identified above that a representation vote does not or would not likely reflect the true wishes of the employees in the bargaining unit about being represented by Local 353? I am satisfied that the answer to this inquiry is "yes".

152. The Board's case law to date has established that, in situations where the employer has put the job security of the employees into question, a reasonable employee would be unable to exercise freely his or her right to choose union representation. Consider, for example, the following comments from the decision of the Board in *Aurora Resthaven Extended Care & Convalescent Centre*, [1986] OLRB Rep. Aug. 1031, at para. 45:

As indicated above, the respondent has contravened sections 64, 66 and 70 of the Act. Those contraventions consist of statements and actions which expressly or impliedly indicated to employees that unionization would lead to layoffs, loss of existing employee privileges, and a significant deterioration in working conditions due to the need to perform the same body of work with fewer staff. Viewed objectively, the employer's unlawful conduct has created a situation in which it is highly unlikely that a representation vote would disclose the employees' true wishes as to whether they desire to be represented by the union in collective bargaining. In *Straton Knitting Mills Limited*, [1979] OLRB Rep. Aug. 801, the Board, in granting certification under what is now section 8 of the Act, found that the employer's activities had likely "transformed the issue in the minds of employees on which employees would be asked to vote in a representation election from one of 'do you wish to be represented in collective bargaining by the applicant' to one of 'do you want continued full and steady employment'." ... As stated by the Board in *Brinks Canada Limited*, [1982] OLRB Rep. Aug. 1140, "[w]hen an employer makes a threat which effectively tells an employee that to choose a union is tantamount to choosing unemployment, the ability of the employee to exercise any free choice is obviously removed".

153. I agree with these observations. Applied to the circumstances of the case before me, I am satisfied that the contraventions of the Act by the employer resulted in a situation where the true wishes of the employees were not likely reflected by the representation vote of October 3, 1996, and would not be reflected in another representation vote if one were taken today. The "economic analysis" engaged in by Andrew and Art was communicated broadly to the employer's employees. The threat to job security inherent in the employer's comments was a message understood by all of the employees. The evidence satisfies me that the employees of the employer were more likely than not answering the question "do you want continued full and steady employment" when they cast their ballots on October 3, 1996.

154. Counsel for the employer submitted that the evidence established that the employees of the employer were relatively sophisticated, and that I ought to take that into account when determining the application of section 11(1)(2) of the Act. I disagree. As noted by the Board in *Centro Mechanical Inc.*, cited above at paragraph 13, the Board approaches this question by considering the effect of the employer's contravention of the Act on "a reasonable employee of average intelligence and fortitude", and therefore I need not and did not assess the degree of sophistication of the employer's employees generally or in particular. I will, however, note that in my view the relative sophistication of some of the employees who testified was hardly universal.

155. Counsel for the employer further relied upon the Board's decision in *Canac Kitchens Limited*, [1994] OLRB Rep. Aug. 972. Counsel reviewed the facts of that decision and submitted that the facts before me were not as severe, yet in *Canac Kitchens* the Board determined to *not* apply section 9.2 of the Act, as it then was. Accordingly, it was submitted that section 11 of the Act ought to have no application on the facts of this case.

156. The distinguishing factor of significance, in my view, between the circumstances event in *Canac Kitchens*, and those here, is the degree to which the threat of job loss - the effect of Andrew and Art's "economic analysis" - filtered through the workplace. The employer here operates a relatively small and close-knit operation when compared to the responding party in *Canac Kitchens*, which had an employee complement exceeding 400. The most significant act of misconduct on the part of the employer has been broadcast widely and has been discussed and commented upon at length by the

employer. It could only have had a most significant effect on the ability of the employees to freely exercise their right to choose Local 353 as their bargaining agent.

157. Turning, then, to the next inquiry that I must make, the Act now specifically requires the Board to answer the question of whether no other remedy, including the taking of another representation vote, is sufficient to counter the effects of the contraventions of the Act. Having regard to the circumstances of this case, I am satisfied that no remedy short of automatic certification can be fashioned which will counter the effects of the contraventions of the Act identified above. As noted, I am of the view that, if a representation vote were to be taken today of those individuals who were eligible to vote in the representation vote held on October 3, 1996, the vote would be to reject Local 353 as the bargaining agent of the employees because the contraventions of the Act committed by Andrew and Art would, for all practical purposes, make it a vote on whether the employees wish to remain employed.

158. Section 11(1)3 of the Act now explicitly requires the Board to make the determination - before automatically certifying a trade union - that *no* other remedy could be crafted by the Board which would counter the effects of the employer's contravention of the Act. The Board has extremely broad remedial authority (as is reflected by section 96(4) of the Act), and if the Board can exercise those powers in a manner which fully counters the effect of the employer's violations of the Act - that is, such that the remedy will place those affected by the employer's violations of the Act in the same position they would otherwise have been in had the unfair labour practices not have been committed - then the Act mandates that those remedial options be imposed by the Board in lieu of automatic certification.

159. However, even the broad remedial powers exercised by the Board have practical limitations. In certain circumstances, it is not possible to magically return the genie back into the bottle, particularly where the employer has broadly communicated a threat of job loss as a consequence of unionization. In those circumstances, one could fairly question the ability of the Board to eliminate the effect of such threats from the minds of the employees. It simply may not be possible to fashion a remedy that will neutralize the memories of the employees affected by threats of job losses. Accordingly, only when the Board is satisfied, on balance, that a remedy or series of remedies can be devised which will fully and completely counter the effect of the contraventions of the Act, will those remedies be imposed when the circumstances would otherwise lead the Board to certify automatically. It must be remembered at this juncture that it is important that remedies ordered by the Board be effective. If the remedy ordered by the Board is insufficiently curative, the effect is to erode the integrity of the Act (see the comments of former Chair George Adams in "Labour Law Remedies", in Swan and Swinton, *Studies in Labour Law* (Butterworths), at p.59), and to eliminate the substantive purpose of section 11 of the Act.

160. The Board's "usual" remedies in circumstances such as those reflected by this proceeding have historically included the issuance of cease and desist orders, the requirement that "postings" be made by the employer, the provision to employees of a copy of the decision, and granting permission for the trade union to speak to the employees about unionization in the absence of the employer. I am satisfied that none of these types of remedies, nor all of them combined, could remedy the effect of the employer's contraventions of the Act described by this decision. As noted above, the employees are all currently of the view - imparted by the employer - that a vote for the union equals a vote for less work, and eventually layoffs. The remedies identified above are not capable of entirely eradicating the effect of the employer's widely-communicated comments respecting job security. In the absence of some other remedy, a second representation vote taken in the future with such remedial orders and directions in place would *still* be no more than a second ballot on the question of whether the employees desired to be laid off.

161. Is there some other or additional remedy which, when imposed in conjunction with the Board's more traditional remedies, would have the effect of eliminating the effects of the employer's violations of the Act? None were specifically identified by counsel for the employer during the course of argument. I have considered, however, a number of potential remedies, such as requiring the employer to establish, empirically, its "economic analysis" in conjunction with the requirement that the employer pay for the full cost of an expert, to be retained by the union, to report to the employees on the "economic analysis" of Andrew and Art. I have, however, rejected the imposition of such a remedial order. I am not satisfied that widespread threats of job loss such as occurred here can be eradicated from the consciousness of the employees of the company even by intrusive remedies such as that identified directly above. Perhaps, as the Board's case law develops, a remedial mixture of some nature will become identified with the ability to remove the effect of threats of job loss made by an employer. At this time, and in the circumstances before me, it is not evident that there is any remedy which can effectively and fully "level the playing field", particularly where, as here, the employer has conceded the universal concern of its employees for their job security.

162. For the reasons outlined above, I am satisfied that the applicant ought to be automatically certified, pursuant to section 11 of the Act.

163. Some remedial orders and directions can be imposed to partially, at least, remedy the current circumstances. First, I order that each employee who was on the list of eligible voters for the October 3, 1996 representation vote, or who attended at the representation vote and voted, or who is currently in the bargaining unit, be provided with a copy of this decision by the union. An original of the posting attached to this decision as Appendix "A", signed by either Andrew or Art, is to be posted in a prominent place at the employer's shop and to remain posted for a period of 60 calendar days from the date of this decision. The posting is not to be removed, defaced or otherwise altered. A Labour Relations Officer of the Board is authorized to attend at the employer's shop at any time during the working day to ensure that the posting remains posted as directed, without alteration, for the time period described above.

164. Furthermore, I order that the union be given an opportunity to meet with and speak to the employees in the bargaining unit, within 30 days of the date of this decision, in the absence of the management of the employer. The union may choose the date, place and time of that meeting. The meeting can last for up to two hours in duration. No employee is to lose any pay by attending the meeting. In that regard, the employer is directed to pay for the attendance at that meeting of those individuals eligible to attend including any reasonable travel time required to attend at the meeting.

165. A certificate will issue to the applicant affiliated bargaining agent on its own behalf and on behalf of all other affiliated bargaining agents of the International Brotherhood of Electrical Workers and the IBEW Construction Council of Ontario in respect of all electricians and electricians' apprentices in the employ of JAK Electrical Contractors Limited in the industrial, commercial and institutional sector of the construction industry in the Province of Ontario, save and except non-working foremen and persons above the rank of non-working foreman.

166. A certificate will also issue to the applicant trade union in respect of all electricians and electricians' apprentices in all sectors of the construction industry in the Municipality of Metropolitan Toronto, the Regional Municipalities of Peel and York, the Towns of Oakville and Halton Hills and that portion of the Town of Milton within the geographic Townships of Esquesing and Trafalgar, and the Towns of Ajax and Pickering in the Regional Municipality of Durham, excluding the industrial, commercial and institutional sector, save and except non-working foremen and persons above the rank of non-working foreman.

167. I will remain seized of these proceedings respecting any matters arising from them.

Appendix "A"

The Labour Relations Act, 1995 NOTICE TO EMPLOYEES

Posted by order of the Ontario Labour Relations Board

WE HAVE POSTED THIS NOTICE IN COMPLIANCE WITH AN ORDER OF THE ONTARIO LABOUR RELATIONS BOARD ISSUED AFTER A HEARING IN WHICH THE UNION AND THE COMPANY PARTICIPATED. THE ONTARIO LABOUR RELATIONS BOARD FOUND THAT JAK ELECTRICAL CONTRACTORS LIMITED VIOLATED THE LABOUR RELATIONS ACT BY THREATENING THE EMPLOYMENT OF ITS EMPLOYEES. THE ONTARIO LABOUR RELATIONS BOARD FURTHER CONCLUDED THAT AS A RESULT OF THESE VIOLATIONS, THE TRUE WISHES OF THE EMPLOYEES WERE NOT LIKELY TO BE ASCERTAINED. AND THE ONTARIO LABOUR RELATIONS BOARD CERTIFIED THE UNION AS BARGAINING AGENT FOR THE GROUP OF EMPLOYEES DESCRIBED AS:

ALL ELECTRICIANS AND ELECTRICIANS' APPRENTICES IN THE EMPLOY OF JAK ELECTRICAL CONTRACTORS LIMITED IN THE INDUSTRIAL, COMMERCIAL AND INSTITUTIONAL SECTOR OF THE CONSTRUCTION INDUSTRY IN THE PROVINCE OF ONTARIO, SAVE AND EXCEPT NON-WORKING FOREMEN AND PERSONS ABOVE THE RANK OF NON-WORKING FOREMAN.

ALL ELECTRICIANS AND ELECTRICIANS' APPRENTICES IN ALL SECTORS OF THE CONSTRUCTION INDUSTRY IN THE MUNICIPALITY OF METROPOLITAN TORONTO, THE REGIONAL MUNICIPALITIES OF PEEL AND YORK, THE TOWNS OF OAKVILLE AND HALTON HILLS AND THAT PORTION OF THE TOWN OF MILTON WITHIN THE GEOGRAPHIC TOWNSHIPS OF ESQUESING AND TRAFALGAR, AND THE TOWNS OF AJAX AND PICKERING IN THE REGIONAL MUNICIPALITY OF DURHAM, EXCLUDING THE INDUSTRIAL, COMMERCIAL AND INSTITUTIONAL SECTOR, SAVE AND EXCEPT NON-WORKING FOREMEN AND PERSONS ABOVE THE RANK OF NON-WORKING FOREMAN.

THE ONTARIO LABOUR RELATIONS BOARD HAS ORDERED THE COMPANY TO ALLOW THE UNION TO MEET WITH EMPLOYEES IN THE BARGAINING UNIT DURING NORMAL WORKING HOURS.

THE ACT GIVES ALL EMPLOYEES THESE RIGHTS:

TO ORGANIZE THEMSELVES;

TO FORM, JOIN AND PARTICIPATE IN THE LAWFUL ACTIVITIES OF A TRADE UNION;

TO ACT TOGETHER FOR COLLECTIVE BARGAINING;

TO REFUSE TO DO ANY AND ALL OF THESE THINGS.

WE ASSURE ALL OF OUR EMPLOYEES THAT WE WILL NOT DO ANYTHING THAT INTERFERES WITH THESE RIGHTS.

JAK ELECTRICAL CONTRACTORS LIMITED

PER: _____
(AUTHORIZED REPRESENTATIVE)

This is an official notice of the Board and must not be removed or defaced.

This notice must remain posted for 60 consecutive days.

DATED this 26th day of August, 1997.

3482-96-U Teresita Lanuza, Applicant v. Ontario Nurses' Association, Responding Party v. The Toronto Hospital, Intervenor

Discharge - Duty of Fair Representation - Unfair Labour Practice - Applicant alleging that union violated its duty of fair representation by failing to present certain arguments and evidence with respect to systemic race discrimination at applicant's discharge grievance arbitration - Application dismissed

BEFORE: *Laura Trachuk*, Vice-Chair.

APPEARANCES: *Paulette S. Haynes, Teresita Lanuza, Reno Sivarajah and Pauline Au* for the applicant; *Risa Pancer, Gail Crossman, Tim Hadwen and Darlene Barnes* for the responding party; *Patricia E. Murray and Pat Scott* for the intervenor.

DECISION OF THE BOARD; August 18, 1997

1. This is an application under section 96 of the *Labour Relations Act, 1995* alleging that the responding party violated section 74.

2. A consultation was held with respect to this matter on July 31, 1997. At the conclusion of that consultation, the Board determined that it could decide the matter on the basis of the arguments presented, and the materials filed, and that it was unnecessary for the parties to call any witnesses to present evidence.

3. The applicant commenced working as a Cardiac Operating Room nurse at the Toronto Hospital in December, 1990. On July 19, 1991 she received a two-day suspension related to her work performance. She filed a grievance with respect to the suspension which the union took to arbitration. The arbitration lasted for eight days and a decision was issued on April 12, 1992. The decision upheld the suspension but required the hospital to provide the applicant with additional training. The applicant asked the union to file an application for judicial review with respect to the arbitrator's decision but it declined. Pursuant to the arbitration decision and as a result of discussions with the union, the applicant transferred to the Plastics Operating Room and received additional training through a preceptor. On June 29, 1992 the applicant was dismissed by the hospital which again cited work performance concerns. The union filed a grievance with respect to the discharge which it pursued to arbitration. The arbitration was before a three person panel. It took fifteen days and a unanimous decision was issued on July 24, 1996 upholding the discharge. The applicant requested the union to file an application for judicial review with respect to the decision but it declined to do so.

4. The applicant also filed a complaint with the Ontario Human Rights Commission which was dismissed in 1995 on the basis that race discrimination issues would be dealt with at the arbitration which commenced in 1994. The union has filed a judicial review application with respect to this and similar decisions of the Commission.

5. The applicant's complaint focuses on the failure of the union to present arguments and evidence with respect to systemic race discrimination at the grievance arbitration. It appears that she identified systemic race discrimination as a factor in the hospital's treatment with respect to both of her grievances. At some point during the discharge grievance process, she also retained her own representative to make the case to the union that it should raise race discrimination in the arbitration and should make an argument based on section 15 of the Charter of Rights and Freedoms. An organization called Nurses and Friends Against Discrimination (NAFAD) also made representations to the union with

respect to raising systemic discrimination and sought standing in the arbitration to raise that issue. The union opposed NAFAD's participation in the arbitration.

6. The applicant does not claim that if the systemic race discrimination issue had been raised, or if the evidence of NAFAD members about systemic race discrimination generally had been introduced as she wished, the result of the arbitration would have been different. However, it is her view that the union should have taken her instructions with respect to how she wanted the case presented and that the systemic race discrimination issue was tied to the "differential treatment" argument which the union did present. She did raise the issue of race discrimination in her examination-in-chief. The arbitration decision also discloses that at one point the panel hearing the arbitration did ascertain that she wanted to continue to be represented by the union and the representative it provided.

7. The Board has carefully considered the arguments presented and the materials filed and has concluded that the union has not violated the *Labour Relations Act, 1995*. The union did not present the arbitration case as the applicant wanted it presented. However, the union has carriage of the grievance at the arbitration stage and is entitled, indeed is obligated, to determine how best to present the case, for the individual grievor, other members of the bargaining unit and the association itself. It is obliged to carefully consider the grievor's suggestions with respect to how to present the case, what evidence to call and what argument to make. But it is not obliged to follow "instructions" from the grievor as to how the case is to be presented provided it does fairly and carefully consider her suggestions. There does not appear to be any doubt that the union did consider the applicant's suggestions. The materials filed, including materials filed by the applicant after the hearing, indicate that the applicant's concerns were repeatedly brought to the union's attention and were discussed. However, the union made a decision to focus on other aspects of the grievance. It argued that the grievor's actions were not serious enough, if proved, to warrant discharge, it also made a "poisoned work environment" argument and a "differential treatment" argument. It is obvious upon reading both arbitration decisions that the representation of the applicant by the union was vigorous and thorough.

8. For the above reasons, the Board does not find that the union's representation of the applicant fell short of its obligations under section 74 of the *Labour Relations Act, 1995*. This application is therefore hereby dismissed.

1517-94-OH Pauline Au, Applicant v. Lyndhurst Hospital, Responding Party

Discharge - Health and Safety - Applicant alleging that she was fired as a result of complaints of sexual harassment and that in making those complaints she was exercising rights under the Occupational Health and Safety Act - Board concluding that applicant's termination was not motivated by complaints of harassment - Application dismissed

BEFORE: *K. G. O'Neil*, Vice-Chair, and Board Members *R. W. Pirrie* and *Pauline R. Seville*.

APPEARANCES: *Harry Kopyto* and *Pauline Au* for the applicant; *Lorenzo Lisi* for the responding party.

DECISION OF THE BOARD; August 15, 1997

1. In this application, Pauline Au claims that she was fired by Lyndhurst Hospital as a result of having raised a safety issue at work, namely sexual harassment by her supervisor. As well, she asserts she was subject to other reprisals prior to her termination. The hospital responds that the termination

was entirely related to restructuring caused by provincial fiscal restraint, and was in no part motivated by “anti-safety” concerns or her complaints of sexual harassment. Further, they deny any pre-termination reprisals.

2. As a preliminary issue, the hospital argued that issues of sexual harassment should not be considered within the ambit of the *Occupational Health and Safety Act* (referred to below as the OHSA), and that the Board should find that it had no jurisdiction to hear this complaint. In an interim decision dated November 10, 1995, reasons reported at [1996] OLRB Rep. May/June 456 the Board found that the applicant had a sufficiently arguable case that the matter should be put on for hearing. An application for judicial review of that decision was dismissed on September 14, 1996.

3. At the outset of the hearing on the merits, we entertained argument on the hospital’s application for reconsideration based on a decision of the Board, differently constituted, dealing with similar issues, which had been made since the interim decision in this matter. See *Musty v. Meridian Magnesium Products Limited*, [1996] OLRB Rep. November/December, 964. The hospital argued that that decision decided the policy issues involved in whether or not the Board should be hearing cases involving sexual harassment under the OHSA. The applicant’s position was that there was no appropriate ground for reconsideration as there was no obvious error or any policy ground which had not been adequately considered in the first decision. Further, it was argued that *Meridian*, cited above, was distinguishable on the basis that it involved outstanding complaints in two different fora, which is not the case here as Ms. Au withdrew her earlier complaint at the Human Rights Commission. A majority of the panel, Mr. Pirrie dissenting, denied the application for reconsideration. It was the majority’s view that an intervening decision on similar issues, but on different arguments and facts, is not an appropriate ground to reconsider. In particular, we note that we were not asked to defer to the Human Rights Commission, as was the panel in *Meridian*, despite our request for submissions on that point prior to issuing the preliminary decision. Rather, we were asked to conclude we had no jurisdiction over the matter, in light of the jurisdiction of the Human Rights Commission over sexual harassment under the *Human Rights Code*.

4. After the oral decision dismissing the application for reconsideration, the hospital requested an adjournment to judicially review it. We declined to do so, noting that it is not the practice of the Board to adjourn for applications for judicial review, in the absence of a decision from the Court staying a decision.

5. The hearing of this matter lasted 17 days, during which we heard the evidence of 8 witnesses. Much of the evidence was not in dispute in the end; we will deal with any necessary evidentiary issues below.

6. We have carefully considered all the evidence and arguments made. For the reasons that follow, the complaint is dismissed, as the evidence established that the termination was not motivated by Ms. Au’s complaints of harassment. Further, we did not find the events complained of prior to termination to be reprisals for her complaints. As to the jurisdiction of the Board to consider matters of sexual harassment under the OHSA, we are of the view that the Board has jurisdiction over complaints asserting reprisals for behaviour protected by the OHSA, even if the factual basis asserted for them includes sexual harassment. However, in such cases the question may often arise as to whether the Board ought to exercise that jurisdiction in light of the explicit coverage of sexual harassment by the *Human Rights Code*.

An overview of the facts

7. Pauline Au is a social worker with a Masters degree (MSW) who worked for Lyndhurst Hospital from May 15, 1989 to November 19, 1993. Lyndhurst Hospital is a small, specialized hospital,

treating victims of spinal cord injury. From all accounts in evidence, Ms. Au discharged her duties as a social worker in a consistently professional manner; there is no issue as to her work performance.

8. When Ms. Au had been at the hospital for about two years, her original supervisor left and was replaced by a male supervisor. Ms. Au testified that he touched her without her consent on four occasions, starting in November 1991, and behaved in other ways which made her fearful in his presence. Throughout the hearing, the hospital chose not to dispute these incidents, and the supervisor did not testify. Thus, we rely on Ms. Au's uncontradicted evidence of the incidents, to the extent relevant to the determination of this complaint.

9. The first incident of touching, as described by Ms. Au, was a November 1991 event in which her supervisor grabbed her by the shoulders to hold her close, while they were having a discussion about work, to which she responded by pulling away. The second was a January, 1992 touching of their thighs when they were looking at a file. The third, a few days later, was what she describes as an unexplained tapping on her shoulder. The first three incidents took place in the secretarial area of the social work department. The fourth incident complained of was some seven months later, when the supervisor squeezed Ms. Au's shoulder in the cafeteria. Besides the four incidents of touching, Ms. Au complained of other behaviour, including odd leering looks, suggestive sitting positions in supervision meetings, and that her office had been moved to be near the men's washroom so the supervisor would have more occasion to be near her office. Ms. Au had concerns that her supervisor would go further, and she would be forcibly confined, sexually assaulted, or poisoned. We are of the view that these concerns were genuinely held, but there is no evidence before us that the more serious things that Ms. Au feared ever took place or were likely to take place.

10. We have no evidence that is not hearsay about the supervisor's perspective or intentions, but the evidence is clear that once the hospital informed him that Ms. Au objected to the touching, he did not touch her again.

11. Ms. Au complained to hospital management, who investigated the incidents and counselled the supervisor, although they were of the view throughout that no human rights violations had occurred. They also sent him a letter directing him not to intentionally touch her again, together with other conditions, breach of which would result in discipline up to discharge. Although no repetition of the original behaviour complained of occurred, Ms. Au complained of reprisals from her supervisor after he was aware of the complaints of harassment.

12. When Ms. Au was terminated in November 1993, she was told that it was due to restructuring and fiscal restraint, but she believed that it was as a result of her complaints of harassment and reprisal.

13. After the termination, Ms. Au returned to the hospital and discussed with staff and patients her view that her complaints of sexual harassment had resulted in her dismissal. As well, she warned them to be on the lookout for sexual abuse of patients, in a context in which it was clear she was inferring that her supervisor, who was still on staff, was a potential abuser. She contacted the Chair of the Board of Directors of the hospital as well, and begged him to do something about abuse of patients, and referred to one in particular whom she described but did not name, citing reasons of professional confidentiality. Later, she would not participate in the investigation the hospital launched in response to her complaints about this patient. She also sent faxes to various organizations and the press accusing the hospital of being racist and sexist, and implying there was patient abuse. This post-termination conduct leads the hospital to maintain that even if the lay-off is found to have been a reprisal, reinstatement is out of the question as a remedy.

14. We will deal first with the legal basis for the complaint and then with the reasons for our conclusions about the lack of causality between the complaints of sexual harassment and the termination, and the events alleged to be pre-termination reprisals.

The statutory context

15. The most pertinent statutory provisions are the following:

25(1) An employer shall ensure that,

- (a) the equipment, materials and protective devices as prescribed are provided;
- (b) the equipment, materials and protective devices provided by the employer are maintained in good condition;
- (c) the measures and procedures prescribed are carried out in the workplace;
- (d) the equipment, materials and protective devices provided by the employer are used as prescribed; and
- (e) a floor, roof, wall, pillar, support or other part of the workplace is capable of supporting all loads to which it may be subjected without causing the materials therein to be stressed beyond the allowable unit stresses established under the *Building Code Act*.

(2) Without limiting the strict duty imposed by subsection (1), an employer shall,

- (a) provide information, instruction and supervision to a worker to protect the health or safety of the worker;

• • •

- (d) acquaint a worker or a person in authority over a worker with any hazard in the work and in the handling, storage, use, disposal, and transport of any article, device, equipment or a biological, chemical or physical agent;

• • •

- (h) take every precaution reasonable in the circumstances for the protection of a worker;

• • •

(27)(1) A supervisor shall ensure that a worker,

- (a) works in the manner and with the protective devices, measures and procedures required by this Act and the regulations; and
- (b) uses or wears the equipment, protective devices or clothing that the worker's employer requires to be used or worn.

(2) Without limiting the duty imposed by subsection (1), a supervisor shall,

- (a) advise a worker of the existence of any potential or actual danger to the health or safety of the worker of which the supervisor is aware;
- (b) where so prescribed, provide a worker with written instructions as to the measures and procedures to be taken for protection of the worker; and

- (c) take every precaution reasonable in the circumstances for the protection of a worker.

28(1) A worker shall,

- (a) work in compliance with the provisions of this Act and regulations;
- (b) use or wear the equipment, protective devices or clothing that the worker's employer requires to be used or worn;
- (c) report to his or her employer or supervisor the absence of or defect in any equipment or protective device of which the worker is aware and which may endanger himself, herself or another worker; and
- (d) report to his or her employer or supervisor any contravention of this Act or the regulations or the existence of any hazard of which he or she knows.

(2) No worker shall,

- (a) remove or make ineffective any protection device required by the regulations or by his or her employer, without providing an adequate temporary protective device and when the need for removing or making ineffective the protective device has ceased, the protective device shall be replaced immediately;
- (b) use or operate any equipment, machine, device or thing or work in a manner that may endanger himself, herself or any other worker; or
- (c) engage in any prank, contest, feat of strength, unnecessary running or rough and boisterous conduct.

• • •

50(1) No employer or person acting on behalf of an employer shall,

- (a) dismiss or threaten to dismiss a worker;
- (b) discipline or suspend or threaten to discipline or suspend a worker;
- (c) impose any penalty upon a worker; or
- (d) intimidate or coerce a worker,

because the worker has acted in compliance with this Act or the regulations or an order made thereunder, has sought the enforcement of this Act or the regulations or has given evidence in a proceeding in respect of the enforcement of this Act or the regulations or in an inquest under the *Coroners Act*.

(2) Where a worker complains that an employer or person acting on behalf of an employer has contravened subsection (1), the worker may either have the matter dealt with by final and binding settlement by arbitration under a collective agreement, if any, or file a complaint with the Ontario Labour Relations Board in which case any regulations governing the practice and procedure of the Board apply with all necessary modifications to the complaint.

(3) The Ontario Labour Relations Board may inquire into any complaint filed under subsection (2), and section 96 of the *Labour Relations Act*, except subsection (5), applies with all necessary modifications as if such section, except subsection (5), is enacted in and forms part of this Act.

(4) On an inquiry by the Ontario Labour Relations Board into a complaint filed under subsection (2), sections 104, 105, 108, 110 and 111 of the *Labour Relations Act* apply with all necessary modifications.

(5) On an inquiry by the Ontario Labour Relations Board into a complaint filed under subsection (2), the burden of proof that an employer or person acting on behalf of an employer did not act contrary to subsection (1) lies upon the employer or the person acting on behalf of the employer.

(6) The Ontario Labour Relations Board shall exercise jurisdiction under this section on a complaint by a Crown employee that the Crown has contravened subsection (1).

(7) Where on an inquiry by the Ontario Labour Relations Board into a complaint filed under subsection (2), the Board determines that a worker has been discharged or otherwise disciplined by an employer for cause and the contract of employment or the collective agreement, as the case may be, does not contain a specific penalty for the infraction, the Board may substitute such other penalty for the discharge or discipline as to the Board seems just and reasonable in all the circumstances.

The legal basis for the complaint

16. The applicant founds her case under the OHSA on the basis that sexual harassment is a hazard that presents a risk to the health and safety of employees, including the risk of injurious stress, which she reported to management. In doing so, the applicant maintains she was acting in compliance with sections 28(1) (a) and (d) and seeking the enforcement of the OHSA, as the employer and its supervisors are obligated to take every precaution reasonable in the circumstances for the protection of workers, as set out in Section 25(2)(h) and 27(2)(c) of the OHSA.

17. The hospital maintains that sexual harassment is not a hazard covered by the OHSA, and that in reporting sexual harassment Ms. Au was not complying with the OHSA, or seeking its enforcement. Rather, the hospital maintains she was raising a human rights issue, which should have been dealt with under the *Human Rights Code*. The hospital argued that this aspect of the case is highlighted by the fact that she never reported the harassment as an unsafe working condition to management or to the health and safety committee. Ms. Woodward, the Human Resources Director, testified that had the matter ever been raised as such by Ms. Au, she would have referred her to the health nurse who chairs the active health and safety committee in the hospital.

18. Further, while not disputing the incidents which Ms. Au reported as sexual harassment, the hospital maintains that they were not objectively speaking sexual harassment, nor dangerous to her health. The hospital acknowledges that Ms. Au may have genuinely felt harassed and the victim of reprisals, but maintains that they should not be recognized legally in the manner she claims.

19. Dealing first with the hospital's original characterization of the matter as something outside the jurisdiction of the Board under OHSA, we are of the view that subsections 50(2) and (3) give the Board jurisdiction to consider any complaint by a worker of reprisal for behaviour protected by the OHSA, in the words, "Where a worker complains that an employer...has contravened subsection 1...the worker may file a complaint with the Ontario Labour Relations Board..." and "The Ontario Labour Relations Board may inquire into any complaint filed under subsection 2...". Further, subsection 50(7) gives jurisdiction to the Board to modify a penalty even where the Board has found cause for the disputed discipline, which would very likely mean that no breach of the OHSA had been found in regards to the discipline. One of the reasons for that could be that the worker was not found to have been acting in compliance with the OHSA.

20. Whether or not the Board's jurisdiction under section 50 will be exercised is a matter for the Board's discretion under subsection 50(2), which is a discretion parallel to the Board's discretion to inquire into complaints of unfair labour practices set out in section 96 of the *Labour Relations Act, 1995*. The discretion in those two sections is exercised with regard to considerations which have been articulated in many different fact situations in the Board's jurisprudence. They include the existence of a *prima facie* case, concurrent or overlapping jurisdiction in other fora and the assessment of whether

there is a labour relations rationale to inquire into the complaint. See *Power Workers' Union - CUPE 1000*, Re: *Mirza Alam*, [1994] OLRB Rep. June 627 and *Meridian*, cited above.

21. In this matter, for the reasons articulated in our interim decision, the majority was of the view that it was appropriate to inquire into this complaint. We found that there was a *prima facie* case, and that in the circumstances which included the lack of an outstanding complaint in another forum, and the unsettled nature of the law, we would inquire into the matter.

22. Since that decision, as mentioned above, the Board, differently constituted, decided in *Meridian*, cited above, not to inquire into a case which contained several similar issues, on the basis of the primary jurisdiction over sexual harassment being with the Human Rights Commission. In *Meridian*, the Board found the existence of an arguable case that sexual harassment was covered by the OHSA, but also considered the opposite conclusion arguable. In the result, the application was dismissed in deference to the jurisdiction of the Human Rights Commission, where the statute is explicit and provides a remedial scheme for the problem which is tailored to remedying the underlying problem of harassment. The Board's discretion has to be exercised in an unfettered manner in response to each fact situation that comes before it, but the considerations referred to in the Board's growing jurisprudence in this area will no doubt offer guidance.

23. We will deal in a moment with the responding party's argument that sexual harassment is not a hazard covered by the OHSA. But it is first appropriate to note that, in our view, a singular focus on whether sexual harassment is a hazard covered by the OHSA is not the appropriate basis for determining this complaint, given the nature of the Board's inquiry on an application under section 50, particularly in the absence of a work refusal. The OHSA has been interpreted, properly so, as a code which encourages the reporting of health and safety issues. This is because the statute is the Legislature's affirmation of the high value of safe workplaces as an important public policy matter. The terms of the OHSA, read as a whole, indicate that it is broadly drafted with that end in mind. The whole internal responsibility system which is at the core of the legislation is designed so that the people most directly concerned, the workers and their managers themselves, will raise and deal with the matters of concern to them at the work place. The external enforcement mechanisms, the inspectors and the Board, are there to reinforce that basic scheme. Section 50 is one of the statutory mechanism aimed at safeguarding the integrity of the process envisioned by the Legislature.

24. With this larger scheme in mind, it makes sense that the provisions of section 50 are drafted without strict definitions of what will be considered behaviour that falls within the words of subsection 50(1) "acted in compliance with...or sought the enforcement of this Act". And it is this larger framework which also gives the legal foundation for the fact that the Board has found on a number of occasions that the worker does not have to be objectively correct about whether something is a hazard at all, let alone a hazard covered by the OHSA, to be protected by the OHSA's prohibition of reprisals for having raised a health and safety concern. Where the concern is genuine, even if mistaken, the reprisal protection applies. See for example, *Firestone Canada Inc.*, [1985] OLRB Rep. July 1044; and *Imperial Oil*, [1982] OLRB Rep. Apr. 580. Where the concern is dishonest or raised for an ulterior motive, the Board has dismissed the complaint, even where there can be a hazard in the situation complained of. See *Continuous Colour Coat Ltd.*, [1989] OLRB Rep. Jan. 10.

25. What is objectively an actual hazard, and one explicitly covered by the OHSA, will have much more relevance to questions of whether there have been breaches of the substantive provisions of the OHSA and its regulations, and whether an order is to be issued by an inspector. Section 50 does not deal with whether there has been such a substantive breach of the OHSA, e.g. whether there has been a breach of the regulations on confined space or toxic substances, and hearings of applications under section 50 seldom deal with the question of whether there has been a substantive breach. For this

reason, the question of whether the employer in this case took every precaution reasonable in the circumstances in compliance with their obligation under section 25 of the OHSA is not before us, although whether Ms. Au was seeking to enforce that section is.

26. The argument about whether sexual harassment is a hazard covered by the OHSA arises in two contexts: as a matter of the appropriate forum in which to have the matter heard, and in determining whether Ms. Au was acting in compliance with the OHSA, or seeking its enforcement, when she complained of sexual harassment. We have dealt with the issue of forum above and in our interim decision.

27. Turning now to whether Ms. Au was acting in compliance with the OHSA, or seeking its enforcement. The applicant's position is that she was seeking the enforcement of sections 25 and 27 of the OHSA, and acting in compliance with section 28 (d) of the OHSA, reporting a hazard of which she was aware, in complaining of sexual harassment to the employer. The hospital's position is that Ms. Au never complied with her obligations under the OHSA, that she never sought compliance with the OHSA or refused work, never reported an unsafe working condition to management or the health and safety committee. Therefore, no remedy should flow. The evidence does not support a finding that Ms. Au was intentionally pursuing the matter under the OHSA, as the OHSA was not in her mind during the time of her employment. However, given the broad remedial thrust of the statute, the Board has not interpreted the wording "acting in compliance with" as requiring a conscious reliance on the statute as the framework within which an action is taken. It has been interpreted rather as covering the raising of hazards, whether or not either of the parties specifically invoked the OHSA in the process. See for instance *Bill's Country Meats*, [1984] OLRB Rep. Nov. 1549 and *Trelford Automobile*, [1990] OLRB Rep. Nov. 1155.

28. The hospital did not seek to disprove the underlying incidents which Ms. Au reported as sexual harassment, but they took the position that they were not objectively a danger to her health. The hospital had never and did not at the hearing, question the *bona fides* of the original complaint or the reprisal complaint. They were of the view that she may have felt sexually harassed and the subject of reprisals. It is the *bona fides* of complaining of this under the rubric of the OHSA which concerns the hospital. The fact that this complaint was an "after-the-fact" characterization is relevant, in the hospital's view, to whether there was a reprisal. As well, it was argued that the delay in complaining should be taken into account as to the *bona fides* of this complaint.

29. The evidence is clear that Ms. Au was of the view that her supervisor's behaviour towards her was hazardous to her health, and that she communicated this to management representatives on a number of occasions. Ms. Woodward testified that Ms. Au seemed genuinely concerned about her safety and that was one of the reasons they sent her supervisor the letter telling him, among other conditions, not to touch her and making it clear that any breach of the directions set out would lead to discipline up to termination. Management's response, understandably in the circumstances, was to do its best to eliminate the offensive behaviour, rather than questioning whether it was truly dangerous, or attempting to ascertain the extent to which Ms. Au's concerns were objectively warranted or not. Thus, the issue of whether or not the behaviour complained of was actually hazardous never crystallized between the parties.

30. Further, the hospital did not seek to challenge in evidence the genuineness of Ms. Au's perception that her supervisor's behaviour towards her was hazardous. Her evidence of physical symptoms of headaches, insomnia, anxiety as well as symptoms of disorientation and general malaise, which she attributed to her treatment by her supervisor, was not challenged. In the result, we find that Ms. Au honestly considered her supervisor's behaviour, which included on her account, grabbing and touching, a hazard, something dangerous to her health at work, and communicated that to the hospital.

31. The potential causes of workplace injury are the hazards to which, generally speaking, the OHSA is addressed. At the hearing of this matter, it was conceded by the hospital, and we find as a fact, that sexual harassment can be hazardous to both physical and mental health. If sexual harassment is recognized as a potential cause of injury, as something hazardous to health must be, it is difficult to resist the conclusion that it falls within the common meaning of the word “hazard” in the OHSA. Although Ms. Au never used words which placed the matter within the domain of the health and safety committee in management’s mind, she did on a number of occasions indicate that she felt unsafe, was fearful for her safety, and that she needed a safe workplace. We note that the behaviour complained of included physical touching, potential assault and allegations of alterations in the physical condition of Ms. Au’s workplace. It is important to recall here that whatever ambiguity there may be about whether stress-producing working conditions, or harassment producing injurious stress, are hazards covered by the OHSA, there is no doubt that working in a manner that may endanger another worker or engaging in rough conduct are activities specifically contemplated as hazardous by the OHSA in section 28(2)(b) and (c) set out above. In these circumstances, we find that Ms. Au was reporting a hazard of which she was aware, which we find to be acting in compliance with section 28(1) (d) of the OHSA.

32. The hospital argued that the fact that Ms. Au never raised her concerns as a matter under OHSA during Ms. Au’s employment goes to the credibility of the section 50 complaint. It is our view that although the legal framework for the section 50 complaint is something that was not in Ms. Au’s mind during her employment, the idea that she felt in danger is not something she thought up after the fact or is a pretext in order to justify this complaint. Thus, we are of the view that the fact that neither party treated the matter as falling under the OHSA during the employment relationship, is not fatal to the complaint. Having concluded that Ms. Au was acting in compliance with the OHSA in reporting what she considered a danger at work, we are of the view that if the employer had terminated Ms. Au for complaining that she considered sexual harassment hazardous to her health, it would be a reprisal under the OHSA.

33. Before leaving this issue, it is appropriate to acknowledge that both parties, in their separate ways, wished the Board to deal more broadly with the question of sexual harassment, but we do not find it appropriate to do so. The employer, as noted, wanted the Board to make a blanket finding that matters involving sexual harassment are not covered by the OHSA and should be dealt with only by the Human Rights Commission. The applicant, on the other hand, asked the Board to deal with the hospital’s approach to the management of sexual harassment, and to criticize its confidential internal process and endorse an approach focussed on the prosecution of the alleged harasser.

34. The Board’s response to these two requests underlines the nature of the Board’s reprisal jurisdiction. We have indicated above and in our preliminary decision the basis for our interpretation of the reprisal jurisdiction to the effect that it is wide enough to include this complaint. But it is not wide enough to extend to an inquiry into what method of management best deals with eradicating sexual harassment. The reprisal jurisdiction is not aimed at solving the underlying problem. Rather, it is focussed on remedying the ill effect of any reprisal for complaining about a health and safety matter. While the latter is not insignificant, we note that both the underlying problem and any reprisal can be dealt with together under the *Human Rights Code*.

The termination decision

35. Randy Swan is the Chief Executive Officer of the Hospital. He made the decisions which resulted in the lay-off of two social workers, including Ms. Au. Mr. Swan faced a situation common to most Ontario hospital administrators in 1993 - a need to cut substantial amounts from the budget. He attempted to do so without affecting direct patient care, and so his cuts affected the non-clinical areas

harder than the clinical areas. These included social work, recreation, library and chaplaincy. There is no longer any chaplain or librarian, and the recreation staff was reduced from three to one.

36. It was Mr. Swan's evidence that the reason Ms. Au and the other social worker were laid off was that they were the least senior in their classification. This is the method the hospital uses for lay-offs whether the position is unionized or not. Ms. Au's position was not unionized, but the service and nursing staff are. Other management witnesses, the Vice-presidents of Human Resources and Rehabilitation Services, Ms. Shirley Woodward and Mr. Bill Sylvestre, corroborated this evidence.

37. Although Ms. Au's supervisor was more junior in the department, he was in a managerial classification, and was not considered in the same lay-off pool. As a result of the same series of decisions, he was effectively demoted. His position was no longer exclusively supervisory and he was given a regular patient caseload - a move to which he objected, as he had been hired as a manager.

38. Mr. Swan put the decision to lay-off two social workers by seniority in the classification in the context of an ongoing process that had affected all areas of the hospital, starting with management, moving to the non-clinical areas and which has continued to the point where clinical areas have now also been affected. Affecting the clinical areas has meant bed closures, so that the hospital reduced its capacity from 79 beds in 1990 to 70 in 1994-1995. A total of 11.7 full-time equivalent lay-offs were done in 1993, including cuts of ward aides in the nursing department, a clinical area.

39. The Ministry of Health provides 85% of the hospital's budget and must approve the hospital's budget. Deficit budgets are not permitted. If there is an actual deficit, costs must be cut somehow. In October 1993, the hospital received the announcement of the funding for the budget year 1994-1995. A projected operating deficit for the year 1993/94 (which ends on March 31, 1994) of almost \$200,000, together with a projected deficit for 1994/95 of over \$400,000 meant the hospital had to "find" approximately \$600,000 *after* the freezing of wages and unpaid days under the social contract legislation. *The Social Contract Act* was in force from June 14, 1993, and the hospital was operating under the "fail-safe" provisions. Unpaid leaves had been used to save five staff positions. The changes to the social work department yielded annual savings of about \$100,000.00.

40. Ms. Au was a member of the hospital's fiscal advisory committee and had received documentation for an August meeting which gave no hint of the magnitude of the lay-off that occurred in November, nor a financial justification for it. As late as October 14, 1993 there was a fiscal advisory committee meeting, and there was no discussion of such a major cut to the social work department. In an August 5, 1993 memo, Mr. Swan had indicated the current deficit at \$58,685 and the projected (annual) deficit to be \$230,000. Ms. Au found the different figures at different times, both monetary figures and numbers of staff reductions planned, somewhat misleading and this contributed to her suspicion that the stated reason for the lay-offs was not the true one. The earlier figures were not put to any of the hospital witnesses in cross-examination, so we do not have their comments on the extent of the differences, but it is clear that the figures were changing over time, and the earlier figures did not cover the period about which Mr. Swan testified, which included the October announcement of the hospital's funding for the next year. His evidence that the numbers changed for external reasons is uncontradicted.

41. The existence of surpluses in the budgets also contributed to Ms. Au's belief that the lay-offs were not justified. Mr. Swan testified that the figure referred to as surplus in the budget is an amount to fund capital purchases; there is a requirement of 2 to 3% surplus, (\$200,000 to \$300,000 out of the hospital's budget of approximately \$10 million) which he noted most hospitals are not doing well at maintaining. In 1993/94 there was in the end a \$58,000 deficit, and part of the surplus of \$223,558 from 1992/93 was used to offset it. There was a small surplus of \$4000 in 1994/95. Mr. Swan testified

that surpluses of this kind are not intended for operating deficits and would soon be completely eliminated.

42. Mr. Swan consulted with senior management in October and November 1993, before deciding on what lay-offs would take place. This included Bill Sylvestre, Vice President for rehabilitation services, who was in charge of the social work department. Mr. Swan did not consult below the level of Vice President and said it would have been inappropriate. He did not speak to Ms. Au's supervisor before making the decision. However, the supervisor knew of, and did not support, Mr. Swan's long-standing view that the department could be restructured to run with only one MSW, with a number of clerical assistants. Mr. Swan had worked in the hospital at a time when there was only 1 MSW and 3 assistants, and he felt that this was a model that had worked well, and would represent significant savings. He felt there were too many professional staff and not enough clerical staff, and had been raising this with vice-presidents for three years prior to the change.

43. Ms. Woodward, Vice-President of Human Resources, spoke to Ms. Au's supervisor about the lay-offs in the social work department in October and said Ms. Au's and Ms. Audain's names came up as the two who were being laid off, but there was nothing specific about Ms. Au in the conversation. Mr. Sylvestre testified that, as far as he was aware, Ms. Au's supervisor neither recommended Ms. Au's lay-off or termination, nor had any input into how the restructuring would be done or who would be laid-off. The evidence warrants the conclusion that Ms. Au's supervisor did not influence the decision to lay her off.

44. Ms. Au found it odd that the social work department had been discussing reorganizing their work teams with existing staff in meetings up to the end of October. Given the fact that the restructuring decision was made well above the departmental level, and over a short time frame, the fact that the department was discussing things on the existing basis is not surprising nor indicative of a reprisal in our view.

45. The structure of the social work department was changed at the time of the 1993 lay-offs. Two MSW positions were deleted, leading to the lay-off of Ms. Au and Ms. Audain. An additional social work assistant position was created, which was filled by the former secretary of social work. The social work assistant and secretarial positions were not offered to Ms. Au and Audain because displaced clerical workers had a call on them and the hospital operates within classification for such transfers. Ms. Au's supervisor resigned in 1994, and he was not replaced, leaving the social work department with one MSW, which Mr. Swan felt was adequate.

46. Ms. Au thought there would be a decline in service and quality under the new structure - that a social worker's services would not easily be standardized so clerical workers could do it properly. She felt each case was different, and although standard letters for some things were being developed by the department itself prior to the lay-off, a lot of correspondence had to be drafted to suit the situation. She testified all the social workers had been very busy prior to the lay-offs. Mr. Swan acknowledged a reduction in social work counselling as a result of the restructuring, but said psychologists and nurses would still do counselling. He was of the view that there had been no reduction in the quality of the care.

47. Mr. Swan's testimony was that the reason the restructuring and lay-offs were done was to save money and have the right people doing the right jobs. He said there was no targeting of Ms. Au, and denied outright that Ms. Au's complaints had anything to do with her termination. At the time of the lay-off, he thought the matter of her complaints had been finalized in the spring of 1993, since he had heard nothing to indicate otherwise.

48. Mr. Swan had been involved with Ms. Au's complaints because she had complained directly to him in August, 1992 of four incidents of touching, inappropriate sitting posture and behaviour in supervision meetings. He considered them human rights rather than health and safety matters.

49. The applicant's representative referred to certain facts as clear indications that the hospital was retaliating against Ms. Au. For example, he argued that the fact that Mr. Sylvestre signed Ms. Au's termination letter, while Ms. Audain's (the other social worker who was laid off) was signed by the departmental supervisor, and the alleged harasser, is a clear indication that there was something suspicious about Ms. Au's termination - that the hospital was likely concerned that having her supervisor sign her letter would reveal the nexus of motivation. This was not pleaded nor raised in Mr. Swan's cross-examination. In this regard, Mr. Swan was only asked why he did not sign the letter if he made the decision, and he answered that Mr. Sylvestre was the Vice-President responsible for the service and was administratively implementing his decision. But he was never asked why the supervisor did not sign the letter. Given this, we are not of the view that it is appropriate to give much weight to this detail. In any event, we note that we have evidence that Ms. Au's letter was changed at her request, to show a different effective date of the termination, because of some vacation time she had planned. We have no evidence of whether the supervisor had signed the original letter that had been prepared in advance of the termination meeting. Further, it would appear that the supervisor was at the termination meeting with Ms. Audain, and Mr. Sylvestre was not. In the result, the difference in the signatures could be explained as easily by which manager did the exit interview. It was not suggested that Ms. Au's exit interview should have been done by her supervisor.

50. The applicant's representative also queried the fact that the release offered to Ms. Audain referred to human rights when the facts relating to human rights were peculiar to Ms. Au, and suggested this was one of the facts that showed an attempt to mask the real motivation. There are a number of reasons not to make the requested inference from this fact. Firstly, this was never put to the hospital administrators in cross examination. Further, Ms. Audain is a member of a racial minority; both in Ms. Au's withdrawn human rights complaint and in this application, the allegation was made that there was an aspect of discrimination on the basis of race or ethnicity to both their terminations. Although this aspect was not pursued before us, it may have been that the release was drafted by counsel to "cover all the bases". The applicant's representative also suggested that Ms. Audain was laid-off to provide a pretext for getting rid of Ms. Au. But there is no evidence for this, and thus no reason to find that to be the case.

51. The applicant's representative argued that the third most obvious fact which proves that the lay-off decision was tainted is what was referred to as the constant intervention of Mr. Swan in the process surrounding Ms. Au's complaints. It was suggested it was "not a far jump" to accept the idea that he was annoyed at both her persistence in complaining and the disruption caused by it and concluded this did not serve the best interests of the hospital, so she should go. And that the supervisor must be affected too to appear fair. The applicant's representative submitted that Mr. Swan took charge of "eliminating the problem." The solution was referred to as a flood of restructuring, sweeping away all the potential embarrassment of Ms. Au's allegations.

52. It was argued that the fact that Mr. Swan did not believe there had been sexual harassment in the first place, but dealt with the matter by giving a strongly worded letter to Ms. Au's supervisor anyway, that he cut the budget when there was a surplus and investigated the post-termination patient abuse allegation when he was convinced there had been no abuse, at great expense in the middle of a fiscal crisis, indicates his behaviour is peculiar and should be considered suspect. We will deal with some of this in more detail below, and have dealt with the budget portion above, but in general, we disagree, and find that the evidence does not warrant such a characterization at all.

53. Mr. Swan was a careful but straightforward witness, and most of his testimony went completely uncontradicted. In addition to the allegations about Mr. Swan's motivation set out above, Ms. Au's representative suggested that Mr. Swan was too sophisticated to be credible. We are not of the view that a certain level of sophistication in a senior hospital administrator is out of place or any reason to doubt his veracity. The evidence does not warrant the inference argued for - that Mr. Swan was using the lay-off as a pretext to eliminate the "problem" that Ms. Au presented. Mr. Swan testified credibly that he had not considered Ms. Au a problem until the post-termination launching of the fax campaign, the visits to the hospital and media campaign. We accept his evidence as truthful.

54. Further, we find nothing in the evidence on which to base a finding that the entire restructuring and lay-off was engineered just to get rid of Ms. Au. It is certainly not unknown in the annals of labour relations to use a reorganization as a cover for an illegal termination. That fact is part of the reason the pleadings disclose a *prima facie* case on the question of a causal nexus between the complaints and the termination. But now that the evidence is in, there is nothing about these facts which raises that spectre. In this respect, we note the budgetary circumstances set out above as well as the fact that the hospital had seen lay-offs since 1990, before Ms. Au's former supervisor was even hired, and continued to lay-off staff in the years after Ms. Au's lay-off.

55. Further, and specific to the administration's motives in dealing with Ms. Au, the evidence before us does not support a finding that they retaliated against her for complaining. The balance of the evidence indicates the opposite, that Ms. Au's complaints were treated seriously, and honestly, and that wherever the hospital administration had a doubt, they gave the benefit of it to Ms. Au, rather than her alleged harasser.

56. The applicant's representative argues that the hospital's handling of Ms. Au's complaints evidenced their bias towards her for complaining and should support an inference as to illegal motivation in her termination. Since it is not in our view central to the determinative issues in this case, we have not set out that evidence in detail. However, we found nothing in the evidence to support the assertion made. To summarize that evidence briefly, we note the hospital encouraged Ms. Au to bring the complaint forward when she first approached them, eight months before she lodged a formal complaint against her supervisor. As a result of her complaint, an interview with the supervisor and advice from legal counsel, a letter was issued to the supervisor advising him not to intentionally touch Ms. Au again, that he should sit in a professional manner and not meet alone with Ms. Au. Further he was advised there were to be no reprisals against Ms. Au because of her complaints, and he was required to receive a human rights educational session. The hospital was of the view that the complaint did not make out any human rights violation because the supervisor did not know the touching was unwanted. Ms. Au is of the view that the supervisor ought to have known the touching was unwanted despite the fact she had not told him so directly. The letter was issued as an educational measure, so there could be no doubt as to the expectations of the hospital for the future. Ms. Au was informed of the letter in a meeting with senior management, during which she thanked them for their action. After this meeting, Mr. Swan delegated responsibility for the matter to the Vice-President of Human Resources, Ms. Shirley Woodward. Either Ms. Woodward or Ms. Sylvestre attended subsequent supervision meetings as an observer. We find nothing warranting the suggested inference in this chain of events or the evidence of the handling of the later reprisal complaints, which are dealt with below.

57. It is appropriate to deal here with an additional evidentiary matter which was said to be relevant to the hospital's handling of the applicant's complaints. On the sixth day of hearing, the applicant's representative asked to call an expert witness on two issues:

- a. Whether sexual harassment has a health and safety aspect - the expert was expected to identify that persons who experience sexual harassment have physical and psychological symptoms;
- and
- b. Whether sexual harassment is a social or interpersonal phenomenon.

58. The expert's testimony was said to be relevant to sections 25, 27, and 28 of the OHSA, and the hospital's alleged failure to take all reasonable precautions, and to the reprisal aspect of the complaint under section 50. In this respect it was argued that the hospital did not take adequate measures to prevent harassment: failure to have literature available, publish standards, or properly monitor the supervisor. We ruled that it was unnecessary to have the expert evidence, as there was no issue in dispute before us on which it could be helpful. The hospital had conceded that there could be physical and psychological symptoms from sexual harassment. Further, given the social policy expressed by the legislature in the *Human Rights Code*, we accept there is a social dimension to sexual harassment. We were of the view that the evidence offered could only be relevant to the assertion that the procedures taken were inadequate to meet the hospital's obligation to take every precaution reasonable in the circumstances, which is not part of our reprisal jurisdiction.

59. The evidence is persuasive that the hospital thought the matter of Ms. Au's complaints had been resolved internally by May, 1993, months before they had the budget announcement that generated the November lay-offs. That they did not specifically exempt her from the restructuring decision because of her complaints is not evidence of retaliation in our view. Nor is it evidence of retaliation that they laid off by seniority in the classification, rather than overall departmental or hospital seniority in effecting the layoffs, in the absence of any evidence that this was not the regular procedure. The fact that going by classification left her supervisor in a managerial position, rather than promoting Ms. Smith and retaining Ms. Au, both of whom were more senior in terms of departmental seniority, (an alternative suggested in evidence by Ms. Au) is similarly an insufficient ground to conclude these decisions were motivated by displeasure at Ms. Au's complaints in the face of all the evidence before us.

60. There is no doubt that the hospital could have downsized in some other manner, but they were under no obligation to do so, or to preserve the structure of the social work department. Further, we do not find anything about the fact that the hospital did not choose Ms. Au's preferred model as indicative of an intent to punish her for having complained of sexual harassment. Thus, the complaint is dismissed in regards to the termination.

Pre-Termination Reprisal complaints

61. The allegations of pre-termination reprisals related to twelve incidents between September 1992 and February 1993 which Ms. Au felt established differential treatment as a reprisal for her complaints. As we were invited to do, we have considered them as a whole, and not just as single incidents. Having done so, we are not of the view that the evidence supports a finding of reprisals before the termination.

62. We have considered the statutory reverse onus in this respect, and the fact that Ms. Au's supervisor did not testify. These factors do not create a presumption that any differential treatment is a reprisal, as the applicant's representative argued. However, in cases where the evidence establishes an employment penalty, the failure of a person centrally involved to testify may provide a basis for an inference as to the mental element of the causality required. That is to say, motive is sometimes inferred from the evidence, not presumed in advance. Given that Ms. Au was the only witness who was present for many of the incidents which make up the pre-termination reprisal allegations, we have based our

findings largely on Ms. Au's own evidence. The onus of proof is largely relevant only when the evidence is evenly balanced. We are not of the view that that is the case here.

63. We have considered in regards to each incident and as a whole whether there was a negative employment consequence to Ms. Au which warrants an inference in the absence of testimony from her supervisor that a reprisal occurred. In a global sense, the incidents complained of do not demonstrate what section 50 requires for a finding of reprisal: the imposition of a penalty, including discipline, intimidation or coercion. We do not doubt that a course of subtle differential treatment could be a penalty. But that is not what these facts show. For most of the instances, the evidence does not establish that Ms. Au was treated differently than others in her department. The ones that do show she was treated differently are situations which do not indicate a penalty, intimidation or coercion. It is clear Ms. Au was never disciplined.

64. We accept that it must have been very difficult for Ms. Au to have continued working with her supervisor given her belief that he could unpredictably turn on her at any moment. However, it is worthwhile noting that Ms. Au's feelings about the situation, while important, cannot determine this matter, in the absence of evidence demonstrating that there was an identifiable penalty against her for complaining. That relations with her supervisor were strained is hardly surprising, and not in itself a reprisal. Further, we note that the reference in section 50 to the imposition of a penalty is not intended to capture all difficulties in a working relationship that occur after a complaint.

65. When Ms. Au raised the complaints of reprisal in March, 1993, the hospital gave the task of investigating them to Mr. Sylvestre, Vice-President of Rehabilitation Services in consultation with the Vice-President of Nursing who was soon to take over responsibility for the social work department. Mr. Sylvestre found no evidence of reprisal activity in the incidents complained of, but rather communication difficulties and what he considered an inability on Ms. Au's part to accept her supervisor's role as such. There were suggestions by the applicant's representative that Mr. Sylvestre was not objective in these conclusions, and that his conclusions should be considered suspect because of that. The issue before us is not the quality of Mr. Sylvestre's investigation. We have considered the matters afresh on the evidence before us, as to whether a breach of section 50 has been made out, not as a review of Mr. Sylvestre's conclusions, which were made for the hospital's internal purposes.

66. Ms. Au was given a chance to respond to the results of Mr. Sylvestre's investigation in a meeting held on May 19, at which the hospital presented its conclusions. Ms. Au made some remarks about the twelve incidents at that meeting, suggesting they should be viewed collectively as a course of petty and vindictive conduct. She noted she was most concerned over two which had implications for patient care, and that she had not ruled out the possibility that she was being oversensitive. She did not respond to the hospital's conclusions either at the meeting or afterwards. She was concerned that she was not allowed a lawyer or other support person to be present at that meeting as the hospital viewed the matter as an internal one at that point. Both she and the hospital had consulted legal counsel by this time, and neither had lawyers at the meeting. We are not of the view that any negative conclusion ought to be drawn under section 50 from the hospital's desire to keep the matter internal at that stage of their investigation.

67. A June 14, 1993 memo confirmed that the hospital saw no human rights violation, and that was the last any of the management witnesses heard of the matter until after Ms. Au was terminated in November.

68. The applicant's representative submitted that Ms. Au continued to feel unsafe and apprehensive after the investigation was concluded, but put in no further complaint because she knew the hospital refused to find the supervisor's activities to be reprisals. By contrast, Ms. Au's evidence was that in the period after this investigation, she saw little of her supervisor over the summer. Her evidence did not

leave the impression that there were incidents which occurred of which she did not complain. On the evidence before us, it would appear, that as with the allegations of sexual harassment themselves, once her supervisor was apprised of her concerns, the behaviour complained of ceased.

69. We turn now to a review of the incidents said to be pre-termination reprisals.

a) Float Day Coverage

70. The policy in the social work department was that the supervisor would cover for absences on vacation or float days when he was there. In the circumstance complained of, the supervisor was also going to be away on the day Ms. Au requested him to cover. He asked her to arrange coverage with others. She felt she should not have had to. Although she may have been the first person in the department to have been in the situation where she and the supervisor were going to be away on the same day, there is no evidence that would support a finding that her supervisor's response was a targeting of Ms. Au. Her own witness, Ms. Audain, indicated there were times when she had to speak to other social workers to arrange coverage. The evidence indicates that the policy was formalized after the incident complained of, but long before her supervisor knew Ms. Au was upset about this incident. Although the applicant's representative suggested there was something untoward in the fact that Ms. Au was the first one to be in this position, there is nothing in the evidence to support that view.

b) Educational seminar

71. A few weeks after her supervisor had been informed of Ms. Au's harassment complaints against him, Ms. Au reported on a seminar on sexual abuse of the physically disabled from a conference she had attended, and played tapes she had obtained there. Her supervisor did not attend, letting her know in advance that he would not be able to come and offering to listen to the tapes on his own time instead. She felt it was a withdrawal of support as a reprisal that he did not attend. Her supervisor attended a seminar report given by her colleague Ms. Audain a few months later and thus Ms. Au saw this as differential treatment.

72. The hospital argues that it would have been very difficult to have had Ms. Au and her supervisor discussing this topic so soon after her complaints were disclosed to him and that it was handled in a diplomatic way. Ms. Au saw it as an indication that the topic was not being taken seriously in reprisal for her complaint. Whether one agrees that it would have been better for her supervisor to attend or not, we are persuaded that his failure to attend was not the imposition of a penalty. The staff educationals were, on the evidence, routine, non-mandatory events. There is no evidence sufficient to support the inference that the supervisor's failure to attend would have so affected Ms. Au's reputation with her colleagues that this would amount to the imposition of a penalty.

c) Supervision of a social work student

73. Ms. Au objects to the fact that supervision of a social work student who was in the department for about four months in 1992 was assigned to another social worker without input from the rest of the department. Employer counsel argued that the reason neither Ms. Au nor Ms. Audain had been assigned the student was that the more senior worker, Ms. Smith, had voiced interest in the assignment. Ms. Au said that both she and Ms. Audain had verbally expressed interest, and she found the choice of Ms. Smith to be favoritism. Ms. Au agreed this problem applied to all the social workers in the department. The evidence indicates that Ms. Au had had a student on another occasion, and that as a result of her complaint about this incident, Ms. Au was put on a committee to plan student supervision for the future.

74. It was argued that it was differential treatment to not provide equal access to the supervision of students. We accept that the opportunity to supervise students may be seen as a leadership and teaching opportunity that expands the professional opportunities in the department, and that an exclusion from such an opportunity as a penalty for complaining could be a reprisal. But the evidence does not establish that. Ms. Au was not singled out in this incident; the effect was the same on Ms. Audain. Further, there is nothing inherently troubling or indicative of differential negative treatment towards Ms. Au in the assignment of a student to the most senior social worker in the absence of evidence that would make it so.

d) Evaluation of a social work student

75. In October 1992, the social workers had agreed at a staff meeting that evaluation of a social work student who was in the department for a mini-placement (18 hours at the rate of one-half day a week) was to be done jointly. This did not happen, as the departmental supervisor did the evaluation himself, and Ms. Au found this to be part of a pattern of reprisals. This incident affected all the social workers, including Ms. Smith, the social worker identified as the recipient of favoritism in others of the reprisal complaints. It did not single out Ms. Au, and we do not see it as a penalty to her.

e) Covering the department during colleagues' absence for lunch at a law firm

76. In December, 1992, a luncheon invitation was extended by a law firm to the social work department to discuss patient issues concerning no-fault accident benefits. Ms. Au did not wish to attend for a number of reasons, which included that she feared she would end up in a car driven by her supervisor. She identified in a memo to him that she was concerned about the cost of taking the whole department off site and the fact that the luncheon would conflict with her scheduled supervision. He responded by saying that the invitation was still open, and that the supervision would be rescheduled, but that if she was going to remain at the hospital, he would appreciate her covering for the other social workers. She agreed, but complained afterwards that he had failed to leave a phone number with her as promised, and had failed to alert her to the need to deal with the return of a piece of equipment to a patient.

77. We do not find that this incident establishes the imposition of a penalty. Ms. Au acknowledged that if she had accepted the invitation, which was extended twice, she would not have been asked to do this work at all. Further, although Ms. Au complained that the phone number where the others could be reached was not left with her personally as promised in a memo, we do not agree that the memo promised it be left with her personally; it simply said a number would be left. The number was called into the secretary, and Ms. Au knew where to find it when she needed it. As to the return of the equipment Ms. Au ended up dealing with, the secretary, who had to go to a meeting for an hour and a half, had left a note on her door directing the delivery person to the receptionist. It appears to have been unintended by anyone that Ms. Au deal with the equipment; the delivery person apparently simply found Ms. Au before he found the secretary's note, and she dealt with the delivery by calling her supervisor at the luncheon. This incident occurred shortly after a meeting where the sexual harassment allegations were discussed between Ms. Au and her supervisor in the presence of Ms. Woodward and Mr. Sylvestre, and it is clear that the relationship continued to be difficult, but that does not convert this incident into the imposition of a penalty.

f) Discharge planning form

78. One of the important functions of social workers at Lyndhurst Hospital is discharge planning. A new discharge form was introduced by the departmental supervisor in December, 1992. After Ms. Au had drafted her first new form, and given it to the secretary to type, she received a memo from her supervisor with directions on certain aspects of the draft. About a week later, Ms. Au heard the

secretary being asked by him to ask another social worker “to have a second crack at the discharge form”, because she had written more than could be fit into the computer field. Taking Ms. Au’s evidence alone, there is nothing here that bespeaks a negative employment consequence. There is no suggestion in the memo that her supervisor is disciplining her, or doing anything other than clarifying expectations on a form that was new to everyone. In other evidence, Ms. Au indicated that she preferred to communicate with her supervisor by memo, since it avoided being in his physical presence. Given that Ms. Au made it clear that she wanted things kept formal with him, we are not of the view this is reprisal material at all. As well, the alleged differential treatment is about two substantively different things. The other social worker had simply written too much; Ms. Au had checked off categories in a different way than the supervisor had intended the form to be used. The fact that he gave different responses does not amount to the imposition of a penalty.

g) Office renovations

79. The seventh incident relates to the fact that Ms. Au and others in the social work department did not know until they heard through rumor that an office was being prepared for the social work student to use. Her supervisor apologized for this oversight. Ms. Au saw this as depriving all but the privileged staff of important information. This is another incident where Ms. Au was not singled out, and there is nothing in the incident itself which indicates that this was a penalty to her.

h) The missing phone

80. This relates to an occasion when Ms. Au was asked by her supervisor if she knew the whereabouts of a missing phone. Later she learned that another social worker had not been asked, and that the secretary had earlier told him where she thought the phone was, which was where it turned out to be - with another staff member. Ms. Au’s objection to his behaviour was that he was raising the issue with only certain staff - not that she thought she was being accused. Ms. Au saw this in the context of a previous incident where her phone was missing; she felt her supervisor was trying to get under her skin by raising this with her and not the social worker Ms. Smith whom Ms. Au thought was the recipient of favoritism. Even if this was not raised with Ms. Smith, we are not of the view that this incident reaches the level of a penalty, intimidation or coercion.

i) Seating arrangements at supervision.

81. This complaint relates to the seating arrangements in the January and February 1993 supervision sessions that Mr. Sylvestre was monitoring. We had evidence from both Mr. Sylvestre and Ms. Au about these meetings. We have concluded that Ms. Au did not wish to sit close to her supervisor nor look at him directly when speaking to him. She was more comfortable on some occasions looking at Mr. Sylvestre. She sometimes asked her supervisor to move his seat, and on another occasion he changed his seat to be directly across from her. Ms. Au felt he was changing his seat to force her to look at him, to make her feel uncomfortable as a way of harassing her. Mr. Sylvestre said the requests to change seating were to assist in communication, as Ms. Au did not seem to acknowledge he was not the supervisor, but was just there to relieve her discomfort with being behind closed doors alone with her supervisor. Mr. Sylvestre testified that Ms. Au would list her case load concerns, but did not want to enter into any kind of conceptual dialogue with her supervisor. It was a one-way flow from her to him. Seating changes were made in the hope of getting her to communicate directly.

82. The applicant’s representative characterized this as an invasion of Ms. Au’s dignity, two male managers in a room with the woman who has complained forcing her to look her harasser in the eye. He asserted that where one looks should be a matter of choice and culture.

83. It is clear that it had become an issue that Ms. Au preferred not to look directly at her supervisor. Although the situation was no doubt awkward, we are not persuaded that Ms. Au was penalized, intimidated or coerced through directions as to seating. In each of the meetings in evidence, she ended up sitting where she suggested, across a large table from her supervisor and Mr. Sylvestre.

j) Directions to review the policy manual

84. This is a complaint that Ms. Au's supervisor asked her twice to sign a form saying she had reviewed a policy manual when the time for doing so had not yet expired. Ms. Au saw this as a way of making life difficult for her at work. She explained that the first time her supervisor asked her, he was standing in a position such that she had to pass by his body very closely to sign and so she did not want to do it right then. She told him she would do it when she had a chance to read it. The second time, he asked her at an inconvenient time. This is another incident where we do not find the imposition of penalty. There was no evidence that the treatment of Ms. Au was different from that of the other social workers, or that it negatively affected her other than being part of the ongoing tension of having to work with the same supervisor.

k) Complaint about Ms. Au

85. A consumer worker (patient advocate) had raised issues about Ms. Au's work on a particular case with her supervisor. She had received support for her activities from the doctor and treatment team involved, and did not feel her supervisor was equally supportive when he interviewed her about it. She felt he was not forthcoming when she asked him at what time of day the complaint had been made, and indicated she had to do a lot of explaining. She felt as if she were being reprimanded for work that was appropriate in the circumstances. When she asked if she was being reprimanded, he said no. She objected to the fact that her supervisor might be sending a letter to the consumer agency involved when the doctor involved was already planning to send a letter. She wrote in her summary of this incident that she felt he would confuse administrative issues with strictly clinical issues, and the threat of a possible reprimand was in fact a form of reprisal. Mr. Sylvestre witnessed this meeting and testified that she was not reprimanded or criticized.

86. We have considered this incident in light of the fact that it was one of the supervisor's duties to deal with such complaints, that the complaint originated independently of her supervisor, and the fact that it is clear that Ms. Au was not reprimanded. Lack of support when interviewing does not appear to be a penalty in these circumstances. It was necessary for the supervisor to find out what Ms. Au's side of the story was. He did that by questioning her, and made a decision not to reprimand her. This is not discipline or the imposition of a penalty. There is no evidence of even the threat of a reprimand, other than the fact that the supervisor had the authority to reprimand her - which, alone, is not a reprisal.

l) Student mini-placement

87. This relates to a mini-placement of a student in February 1993. Ms. Au's complaint is that her supervisor took the student as his own, rather than giving an opportunity to the staff to express their interest in supervising this student. She complains that he appointed himself to be co-ordinator between the social work staff and the outside educational institution. To her it is part and parcel of a decision making style that excludes staff participation. She further objected to his meeting with staff separately in supervision meetings because it was an opportunity for differential treatment without the rest of the staff being aware of it. There is nothing about this incident that is specific to Ms. Au, and it is not evidence of reprisal activity in our view.

88. In sum, reviewing the complaints of reprisal activity together and separately, we are of the view there was no reprisal against Ms. Au, and accordingly the complaint is dismissed in its entirety.

Post-Termination events

89. The applicant's representative objected to evidence of events which occurred after Ms. Au's termination. We allowed the hospital's evidence as it was in our view relevant to its theory of the case that the employment relationship had been irrevocably breached, even if there had been a breach of the OHSA. However, we ruled that we would not allow evidence of the content of settlement offers made. Given our conclusions above, it is not necessary to this decision that we deal with the post-termination events. However, those events are potentially relevant to our discretion under section 50(7), which can be briefly dealt with.

90. The complainant did not specifically ask the Board to exercise its discretion under section 50(7), but the hospital argued we ought not to, for reasons that included the post termination conduct which we have briefly summarized at paragraph 13 above. In addressing our discretion under section 50(7) we have considered the fact that the termination here was non-disciplinary - part of what we have found to be a *bona fide* "downsizing" for financial reasons. The applicant was not discharged for cause, or disciplined at all. In these circumstances we are of the view that there is no basis for the exercise of our discretion under section 50(7).

91. For the reasons set out above, the complaint is dismissed.

DECISION OF R. W. PIRRIE, BOARD MEMBER: August 15, 1997

1. In concur with the decision that Ms. Au's complaint is dismissed, both with regard to the termination and the alleged reprisal activity. I do however feel compelled to comment on two aspects of the decision.

2. First, I would like to elaborate on my reason for dissenting from the majority decision not to allow the hospital's application for reconsideration of this panel's November 10, 1995 decision, as outlined in paragraph 3 above. It was, and is my view that the intervening *Meridian* decision to defer that case, which also concerned sexual harassment under OHSA, properly set the Board's policy in dealing with such issues.

3. I believe it is highly relevant that *Meridian* was decided by the Chair of the Board sitting alone, and I would note that the Chair observed in his decision that the presence or absence of a companion application before the Human Rights Commission should not be determinative of a decision to defer a sexual harassment/OHSA case to the HRC.

4. Further, it is my view that this request for reconsideration was significantly different from the normal reconsideration request which the Board deals with. Were we asked to overturn an earlier decision on the merits of a case after a full hearing simply because another panel of the Board arrived at a different decision on essentially the same facts, I would have sustained the Board's jurisprudence of not reconsidering, and I would not have dissented. That however was not the circumstance. We were dealing with a significant but quite new policy issue, and not a matter previously decided on its merits.

5. The second area on which I wish to comment is the post-termination events. We heard the evidence concerning these events over the objection of Ms. Au's representative. We did so on the basis that it was the hospital's view that the employment relationship had been irrevocably breached, even if there had been a violation of the OHSA. In light of the decision to dismiss Ms. Au's complaint in its

entirety, it is not necessary to deal with the post-termination events. However, given their importance in the total context of this case, I find it appropriate to comment on the happenings.

6. The events are summarized at paragraph 13 of the decision. A good deal of the evidence surrounding those events was from Ms. Au herself, in what appeared to me to be an attempt to rationalize her actions. I will not recount here the detail of those events. I am compelled to say however, that whatever Ms. Au's feelings, experience and suspicions were at the time, her conduct on the ward with patients, their families and staff is not compatible with her continued employment as a social worker at the hospital. Discretion in handling highly sensitive matters such as sexual harassment and patient abuse ought to be the hallmark of any professional social workers' behaviour - whether inside or outside an employment relationship. Equally, her conduct in sending what I can only characterize as the scurrilous fax message was reprehensible. Perhaps Ms. Au felt she had nothing to lose, but throwing all caution to the wind has its consequences. Broadcasting her warnings, with no attempt to control the circumstances under which she did so, stands in stark contrast to what the hospital has a right to expect from any employee, and in particular a social worker.

3867-96-R; 4119-96-U Ontario Pipe Trades Council of the United Association of Journeymen and Apprentices of the Plumbing and Pipe Fitting Industry of the United States and Canada, and the United Association of Journeymen and Apprentices of the Plumbing and Pipe Fitting Industry of the United States and Canada, Applicant v. **Marsil Mechanical Inc.**, Responding Party; Ontario Pipe Trades Council of the United Association of Journeymen and Apprentices of the Plumbing and Pipe Fitting Industry of the United States and Canada, and the United Association of Journeymen and Apprentices of the Plumbing and Pipe Fitting Industry of the United States and Canada, Applicant v. Marsil Mechanical Inc. and Marco Grande, Responding Parties

Certification - Construction Industry - Employee - UA applying to represent bargaining units of plumbers and steamfitters and their apprentices - UA disputing entitlement to vote of individual allegedly not properly working under Trades Qualification and Apprenticeship Act - Board holding that disputed individual should be considered employed in bargaining unit, notwithstanding that he was neither an apprentice nor a journeyman plumber or steamfitter at the time the application was made, but where he had spent a majority of his time on the application date working in the trade and he had been working or employed in the trade for not more than three months - Board finding that owner's brother not exercising managerial functions and that his ballot cast in representation vote should be counted

BEFORE: *G. T. Surdykowski*, Vice-Chair.

APPEARANCES: *James Fyshe, Garth Cochrane, Dennis Carter, Tony Timperio and Morris Frandsen* for the applicant; *Joseph Liberman, Erin Kuzz and Marco Grande* for the responding parties.

DECISION OF THE BOARD; July 25, 1997

I Introduction

1. Board File No. 3867-96-R is an application for certification under the construction industry provisions of the *Labour Relations Act, 1995* (the "Act"). By decision dated February 26, 1997, the

Board (differently constituted) directed that a representation vote be taken in the following voting constituency:

all plumbers and plumbers' apprentices and steamfitters and steamfitters' apprentices in the employ of Marsil Mechanical Inc. in the industrial, commercial and institutional sector of the construction industry in the Province of Ontario, and all plumbers' apprentices and steamfitters' apprentices in the employ of Marsil Mechanical Inc. in all other sectors of the construction industry in the County of Simcoe and the District Municipality of Muskoka, save and except non-working foremen and persons above the rank of non-working foreman. [sic]

Notwithstanding the apparent inadvertent omission of journeymen plumbers and steamfitters in the second part of the description of the voting constituency, it is apparent that it was intended to include them to reflect the bargaining unit description which the Board determined to be appropriate at paragraph 5 of that same decision.

2. The vote was held on February 28, 1997 as directed by the Board. Five persons cast ballots. All ballots have been segregated and the ballot box has been sealed pending the determination of the dispute between the parties in that respect.

3. The dispute between the parties concerns the status and entitlement to vote of Teddy Petrushevski and Silvio Grande. The applicant trade union (the "U.A.") asserts that Petrushevski was not properly working under the *Trades Qualification and Apprenticeship Act* (the "*Apprenticeship Act*") and should therefore not be included as an employee in the bargaining unit (and therefore had no right to vote). The U.A. asserts that Silvio Grande exercises managerial functions within the meaning of section 1(3)(b) of the Act and is therefore deemed not to be an employee in the bargaining unit (and accordingly has no right to vote either).

4. I note that the employer ("Marsil") chose (rightly in my view - see *Alcan Aluminium Limited*, Board File Nos. 2736-96-R and 2743-96-R, decision dated June 9, 1997, unreported to date) not to pursue its challenges to two other persons (Morris Frandsen and Tony Timperio) whose names were included on the voters' list and who cast ballots on the basis that their employment was obtained by fraud, specifically an alleged undertaking or agreement by the U.A. not to bring an application for certification if they were employed by Marsil.

5. Board File No. 4119-96-U is a complaint under section 96 of the Act in which the U.A. alleges that Marsil and Marco Grande terminated the employment of Tony Timperio ("because of his union affiliation and his support for the [U.A.] in the certification application [in Board File No. 3867-96-R]"), contrary to section 72 of the Act. The relief sought by the U.A. includes the reinstatement of Timperio and damages consisting of his lost wages and benefits, with interest; and certification in Board File No. 3867-96-R under section 11(1) of the Act.

II The Apprenticeship Act Issue

6. The facts relevant to the question of Petrushevski's status were not in dispute. Accordingly, after these facts were stipulated, the parties made their representations. The parties then called their evidence and made their representations with respect to the question of Silvio Grande's status and the U.A.'s section 96 complaint. It was agreed that the Board would determine whether Petrushevski and Silvio Grande were entitled to vote and that the ballot box would be opened and eligible ballots counted, and that only if the U.A. loses the vote would the Board determine the section 11(1) issue in the section 96 complaint, although the section 72 aspect of the complaint will have to be determined in any event.

7. Teddy Petrushevski was neither a registered apprentice plumber or steamfitter, nor a journeyman in either trade at the time the application for certification was made. He performed some work

in the trade for Marsil in mid-to-late December, 1996 and then started to work full time during the week ending January 10, 1997. This application for certification was filed on February 20, 1997. It was not until February 26, 1997 that Petrushevski's apprenticeship documents were forwarded to the appropriate government Ministry for processing. In addition, the U.A. points out that if Petrushevski (and Silvio Grande) are counted as apprentices, Marsil was "out of ratio" on the certification application date because one of the other three employees was also an apprentice. There was no suggestion that Petrushevski was not doing bargaining unit work (i.e. working in either the plumbing or steamfitting trade) for a majority of his time on the date of application.

8. The question is whether Petrushevski should be considered to be an employee in the bargaining unit in this application notwithstanding that he was neither an apprentice nor a journeyman plumber or steamfitter at the time the application was made. In that respect, it calls into question the Board's "observation" in paragraph 37 of *Heritage Mechanical*, [1995] OLRB Rep. Mar. 272 as follows:

37. Finally, we observe that Goodlet and Drake would properly be included on the list of employees in the application for certification even if neither had been registered apprentice sheet metal workers on the certification application date. Section 9 of the *Trades Qualification Act* appears to permit a person to work at a trade for which an apprenticeship training program is established without a certificate of apprenticeship or qualification in the trade for up to three months. Accordingly, a person who is not a journeyman or registered apprentice may lawfully work in a compulsory certified trade for up to three months, and is therefore properly included on the list of employees for certification purposes for up to three months from the day s/he begins work in the trade. In this case, both Goodlet and Drake had worked for the responding employer for less than three months at the time the application for certification was made and would therefore be properly included on the list of employees in the bargaining unit even if they had not been registered as apprentice sheet metal workers.

Subsequently, in dismissing a request that it reconsider (only) paragraph 37 of that decision, the Board stated that:

4. If, as the applicant asserts, paragraph 37 of the March 21, 1995 decision (only part of which is excerpted in the applicant's request for reconsideration) is *obiter*, then it is unnecessary to the Board's decision and removing paragraph 37 entirely would not change the decision.

5. Whether or not paragraph 37, or that part excerpted in the applicant's request for reconsideration, is *obiter*, it is clearly reasoning in the alternative or in addition to the Board's finding that Messrs. Goodlet and Drake were registered apprentice sheet metal workers on the certification application date, which was by itself dispositive of the list issue between the parties with respect to those two persons, and with respect to which the applicant does not take issue.

6. Indeed, the applicant appears to concede all of this since it seeks to have the Board reconsider or "clarify" paragraph 37, and does not seek reconsideration of the decision itself.

7. Assuming that it would be appropriate for the Board to reconsider a part of a decision in these circumstances, we note that the application of the *Trades Qualification Act* was squarely in issue before the Board in this proceeding. Indeed, it was the applicant itself which raised that issue, which concerns the interpretation and application of that legislation, and specifically sections 9 and 11 thereof, to applications for certification before the Board. Consequently, while neither party specifically dealt with the application of section 9(1)(b) of the *Trades Qualification Act*, that matter was certainly before the Board. It would be inappropriate for the Board to ignore part of an applicable legislative provision merely because the parties failed or chose not to address it.

8. In any event, it appears that the applicant's real concern is that the Board's March 21, 1995 decision forever closes the door on the section 9(1)(b) question. Those who regularly appear before the Board, as the applicant does, must know that a party which has a cogent argument to make on an issue of this nature will be heard by the Board, unless the matter is so well settled that it is considered to be trite law. As it stands the March 21, 1995 decision herein is the only one of which

we are aware which addresses the question of how section 9(1)(b) of the *Trades Qualification Act* applies in Board proceedings, and if it is *obiter* (which it probably is) it is no more than one construction panel's view of the matter.

(*Heritage Mechanical*, [1995] OLRD No. 1448)

9. In contrast, in *Naylor Group Incorporated*, [1986] OLRB Rep. Nov. 1563, the Board held that:

18. The Board disagrees with respondent counsel that any of the three employees are apprentices pursuant to the *Apprenticeship Act*. Section 1(a) defines apprentice to mean "...a person who is at least sixteen years of age and who has entered into a contract under which he is to receive, from or through his employer, training and instruction in a trade". The filing of an Application for Apprenticeship, the payment of the requisite fee and the setting of the effective date for the application, together with an instruction from the Ministry's consultant as to the journeyman's rate on which the employer is to base the minimum apprenticeship rate to be paid to the apprenticeship applicant does not, in the Board's view, constitute evidence of a Contract of Apprenticeship in the common law sense. There is no evidence before the Board that the respondent had undertaken and the employees had accepted a rate of pay which satisfied the requirements of the Act. Nor does the Board read the judgement in the *Singh* case, *supra*, that such conditions constitute a Contract of Apprenticeship. The defendant Singh was found guilty of having violated the *Apprenticeship Act* by failing to pay the required rates under a Contract of Apprenticeship. It is clear from the judgement that the Court had before it a formal Contract of Apprenticeship and was not relying simply on the Application for Apprenticeship.

19. Should the Board be wrong and should the conditions cited by counsel be a Contract of Apprenticeship in common law, it is not a Contract of Apprenticeship within the meaning of the *Apprenticeship Act*. While it may be argued such a contract would satisfy section 1(a) of that Act, other sections of the Act and its Regulations cause the Board to conclude that it does not.

20. It is beyond dispute that section 9 of the *Apprenticeship Act* applies to a certified trade like the sheet metal trade. Subsection 1 of section 9 requires persons not qualified in the trade to "...forthwith apply in the prescribed form for apprenticeship in that trade; and within three months after commencing work in that trade, file with the Director his Contract of Apprenticeship" (emphasis added). Ontario Regulation 36 requires that an Application for Apprenticeship be in the form provided by the Minister (section 2) and section 11(1) requires that a Contract of Apprenticeship be in the form provided by the Minister. Therefore, in the Board's view, when section 1(a) of the *Apprenticeship Act* uses the word "contract" in defining apprentice, it is referring to a contract in the form prescribed by the Regulations under the Act. Similarly, this is the form of contract being addressed by section 15 of the *Apprenticeship Act* when it says "[e]very contract of apprenticeship shall, upon its approval by the Director, be registered by him forthwith". None of the three employees had signed a Contract of Apprenticeship with the respondent in the form prescribed by the Act and its Regulations on or before September 12, 1986. It follows, therefore, that none had filed contracts in the prescribed form with the Director of Apprenticeship for his approval and registration pursuant to section 15. It is not unreasonable to conclude in the circumstances that none of the three were apprentices under the Act and, if they are not apprentices, it follows that they could not be registered apprentices as that term relates to the requirements of the *Apprenticeship Act*.

21. That conclusion is supported by the Board's decision in *Castle Plumbing and Heating Inc.*, Board File No. 0076-85-R, an unreported decision which issued July 22, 1985. The Board in that case was dealing with an issue respecting two employees who, by the date of making of an application for certification, had applied for apprenticeship in the sheet metal trade, were performing work of the trade and awaiting approval and acceptance of their applications. It was an agreed fact that they became "registered" sheet metal apprentices after the certification application date. The decision is silent with respect to what constitutes becoming registered. It would appear from paragraph 6 of the decision set out below, that the Board concluded that a Contract of Apprenticeship becomes registered at the time it is approved by the Director:

6. It is clear that under the *Apprenticeship and Tradesmen's Qualification Act* and the regulations thereunder a contract of apprenticeship is registered after the approval of the Director of Apprenticeship and that Messrs. Beek and MacDonald were by the regulations exempt from the provisions of section 9 of the *Apprenticeship and Tradesmen's Qualification Act* because they had applied in the prescribed form for apprenticeship in the certified trade of sheet metal worker because they apparently worked in that trade for three months or less before becoming registered sheet metal apprentices. However, on the date of the making of the application they were not registered sheet metal apprentices and in determining the number of employees in the bargaining unit for the purpose of the count under section 7(1), the Board includes only those persons who were within the definition of the bargaining unit on the date of the making of the application. Accordingly, John Beek and Steve MacDonald are not including for the purposes of the count.

22. Respondent counsel argues that the Board need not and should not follow the decision in *Castle Plumbing, supra*, because it does not address his alternative argument that the operation of section 7 of Ontario Regulation 57 is sufficient to satisfy the Board's concern about not wishing to include in the bargaining unit for purposes of the count under section 7(1) of the *Labour Relations Act*, persons who cannot lawfully work in the trade. Counsel submits that anyone working in the sheet metal trade on the date of making of the application should be considered *prima facie* to be included in the bargaining unit unless it is established that they are not lawfully at work in the trade. Persons who have fulfilled the conditions of section 7 of Regulation 57 are exempt from the prohibition set up under section 11(2) of the *Apprenticeship Act* and are entitled to lawfully work in the trade. Therefore, anyone working in the trade for the employer on the certification application date who has satisfied section 7 would be lawfully at work and the Board should include them in the bargaining unit. As the Board has said earlier in the decision, accepting this argument would include Laurien and Lowenberg in the unit.

23. There is no doubt that the Board has discretion to do as counsel argues, the question is whether that would be the appropriate exercise of its discretion. Section 9(2) of the *Apprenticeship Act* makes it clear that the effects of section 7 of Ontario Regulation 57 only exempts an employee in the trade for a three month period from the start of his employment in the trade. If the employee fails to file his Contract of Apprenticeship with the Director before the expiry of the three month period, section 9(2) mandates that the employee cease to work in the trade until he complies with section 9(1)(b). Therefore, it may be seen that the act of filing the Apprenticeship Contract with the Director establishes with greater certainty compliance with section 11 of the *Apprenticeship Act*. While the Board in the *Irvcon* decision did not explicitly address this issue, it seems to recognize the effect which would come from a filing of a Contract of Apprenticeship with the Director when it states as follows at paragraph 7:

7. In the context of the present case, of course, to adopt the applicant's position would mean that the employees in question are not employees in the bargaining unit. They would not be entitled to any voice in the determination as to whether the applicant trade union should be entitled to represent sheet metal workers, *but it also follows that if the applicant trade union were certified they would not be able to continue as employees unless they became registered apprentices.*

[emphasis added]

24. Having regard to all of the foregoing, to the provisions of the *Apprenticeship Act* and its Regulations and to the evidence before the Board herein, those persons who on September 12th, 1986, would be registered sheet metal apprentices in the bargaining unit found herein to be appropriate for collective bargaining, would be those persons who, on or before that date, had, at the very least, filed with the Director a Contract of Apprenticeship in the form prescribed by the *Apprenticeship Act* and its Regulations. Since no Contract of Apprenticeship in the prescribed form had been filed with the Director by or for Jordan, Laurien and Lowenberg on or before September 12th, none of them were registered sheet metal apprentices on that date. Accordingly, none of them are included in the bargaining unit for purposes of the count.

10. "Plumber" and "steamfitter" (the latter being the same as "pipefitter" for purposes of the Act: *D.E. Witmer Plumbing and Heating Limited*, [1987] OLRB Rep. Oct. 1228) are trades which are

specifically recognized and dealt with by the *Apprenticeship Act*. Among other things, the *Apprenticeship Act* provides that:

1. In this Act,

“apprentice” means a person who is at least sixteen years of age and who has entered into a contract under which the person is to receive, from or through his or her employer, training and instruction in a trade;

“certified trade” means a trade designated as a certified trade under section 10.

9.-(1) Every person who commences to work at a trade for which an apprentice training program is established but who does not hold a certificate of apprenticeship or qualification in that trade shall,

- (a) forthwith apply in the prescribed form for apprenticeship in that trade; and
- (b) within three months after commencing to work in that trade, file with the Director his or her contract of apprenticeship.

(2) Every person who fails to comply with subsection (1) shall, upon the expiration of the period of three months mentioned in clause (1) (b), cease to work in that trade until the person files with the Director his or her contract of apprenticeship or until the Director authorizes in writing the continuation or resumption of such work.

10.-(1) The Lieutenant Governor in Council may designate any trade as a certified trade for the purposes of this Act, and may provide for separate branches or classifications within the trade.

(2) No person, other than an apprentice or a person of a class that is exempt from this section or a person referred to in subsection (4), shall work or be employed in a certified trade unless he or she holds a subsisting certificate of qualification in the certified trade.

(3) No person shall employ any person, other than an apprentice or a person of a class that is exempt from this section or a person referred to in subsection (4), in a certified trade unless the person employed holds a subsisting certificate of qualification in the certified trade.

(4) When a trade is certified under subsection (1), a person who is working in the trade at the time that it is certified shall be allowed a period of two years from the first day of the month following the month in which the trade is certified to qualify for a certificate of qualification in the trade, if the person,

- (a) is the holder of a certificate of apprenticeship in the trade; or
- (b) satisfies the Director that he or she has been continuously engaged as a journeyman in the trade for a period of time in excess of the apprenticeship period for the trade; or
- (c) satisfies the Director that he or she is qualified to work in the trade and meets such other requirements as the Director may prescribe.

11. In addition, section 5 of Regulation 1073 (“Plumber”) under the *Apprenticeship Act* provides that:

5. A person is exempt from subsection 10(2) of the Act if he or she,

- (a) applies in the prescribed form for apprenticeship in the certified trade; and
- (b) works in that trade for three months or less.

(Section 5 of Regulation 1079 “Steamfitter” contains an identical provision).

12. The trades of plumber (Regulation 1073) and steamfitter (Regulation 1079) are compulsory certified trades under the *Apprenticeship Act*. This means that only persons who are qualified journeymen or apprentices in these trades, within the meaning of the *Apprenticeship Act*, may lawfully perform the work of a plumber or steamfitter. But this requirement is subject to exceptions specified in the *Apprentice Act* or the Regulations under the Act which are specific to the trade. In *O.J. Pipelines Inc.*, [1989] OLRB Rep. Sept. 976, an application for certification by U.A., Local 800 from which the Board quoted at length in *Heritage Mechanical*, *supra*, the Board explained it this way:

6. Although section 6(1) of the *Labour Relations Act* gives the Board a discretion in determining “the unit of employees that is appropriate for collective bargaining”, that discretion is limited in applications for certification in the construction industry by sections 6(3), 119, 139 and 144 of the Act [as they then were]. All applications for certification in the construction industry must be made pursuant to sections 119 and 144 (*Clarence H. Graham Limited*, [1981] OLRB Rep. Sept. 1195; *Ninco Construction Ltd.*, [1982] OLRB Rep. Nov. 1692; *Manacon Construction Limited*, [1983] OLRB Rep. March 407 and July 1104; *Ellis-Don Limited*, [1988] OLRB Rep. Dec. 1254 and [1989] OLRB Rep. March 234; *Wraymar Construction and Rental Sales Ltd.*, [1989] OLRB Rep. June 682). Under the province-wide bargaining provisions of the Act, there are organizations of trade unions, called designated employee bargaining agencies, which are designated to represent in the industrial, commercial and institutional (“ICI”) sector of the construction industry those employees in certain specified trades or crafts (for our purposes those terms are synonymous) who are represented by the trade unions, known as affiliated bargaining agents, which constitute them. A trade union which is an affiliated bargaining agent of a designated employee bargaining agency may, at its option, apply for certification under either section 144(1) or (3), or enter into voluntary recognition agreements under section 144(4). Trade unions which are not represented by a designated employee bargaining agency, and which are therefore not affiliated bargaining agents to which sections 144(1) through (4) of the Act apply (such as the Christian Labour Association of Canada) can apply for certification or enter into voluntary recognition agreements in the construction industry under section 144(5).

7. The designation orders issued pursuant to section 139(1) of the Act describe the provincial units of employees for the province-wide collective bargaining scheme established by the Act for the ICI sector of the construction industry in terms of trades, and designate, for each such provincial bargaining unit, an employer and an employee bargaining agency. In effect, such designation orders designate the trades which “belong” to each employee bargaining agency and its affiliated bargaining agents for purposes of the province-wide collective bargaining scheme. In the result, employee bargaining agencies and their affiliated bargaining agents can only represent, in the province-wide ICI collective bargaining scheme, those employees who are in a trade they have been designated to represent (*Ninco Construction Ltd.*, *supra*; *Manacon Construction Limited*, *supra*; *Superior Plumbing & Heating Ltd.*, [1986] OLRB Rep. Nov. 1589; *D. E. Witmer Plumbing and Heating Limited*, [1987] OLRB Rep. Oct. 1228; *Ellis-Don Limited*, *supra*; *Wraymar Construction and Rental Sales Ltd.*, *supra*). Indeed, the structure of the Act requires an affiliated bargaining agent to seek bargaining rights for all employees in the trade(s) which its employee bargaining agency has been designated to represent in bargaining in the ICI sector (in the pertinent designation order) when making an application for certification which relates to that sector (*Dufresne Piling Co. (1967) Ltd.*, [1984] OLRB Rep. July 924; *Kraft Construction Company (1978) Ltd.*, [1989] OLRB Rep. Feb. 169; *Wraymar Construction and Rental Sales Ltd.*, *supra*). Consequently, in applications for certification under section 144(1), the Board, although not necessarily bound to use the precise words of the designation order, cannot describe a bargaining unit which relates to the ICI sector in a manner which is inconsistent with the applicable designation order. To accommodate the designation system, and recognizing that trade union representation in the construction industry has historically been along trade lines, the Board’s practice, in applications under section 144(1), is to describe bargaining units in terms of the relevant trade and to use the words of the applicable designation order.

8. Pursuant to the designation order referred to in paragraph 1 above, the United Association of Journeymen and Apprentices of the Plumbing and Pipefitting Industry of the United States and Canada, and the Ontario Pipe Trades Council of the United Association of the Plumbing and Pipefitting Industry of the United States and Canada, has been designated to represent in bargaining

in the ICI sector of the construction industry” all Journeymen and Apprentice Plumbers and Pipefitters” represented by its affiliated bargaining agents .

In paragraph 9 of that decision the Board set out the definitions of “apprentice” and “certified trade” and the provisions in what are now sections 1, 9 and 10 of the *Apprenticeship Act* as set out above, and then continued as follows:

10. It is evident from the Board’s decisions in cases like *Irvcon Roofing & Sheet Metal (Pembroke) Ltd.*, [1981] OLRB Rep. Nov. 1594; *C.T. Windows Limited*, [1982] OLRB Rep. Nov. 1597 and [1983] OLRB Rep. May 627; *Mechanical Insulations Roofing & Siding Ltd.*, [1985] OLRB Rep. April 549; *Naylor Group Incorporated*, [1986] OLRB Rep. Nov. 1563; *Phase IV (4) Electrical Contractors Limited*, Board File No. 2792-87-R, unreported decisions dated March 25, 1988 and July 5, 1988), and *B. C. Meck*, [1988] OLRB Rep. June 546 that the focus of the Board’s concern in applications for certification relating to bargaining units described in terms of compulsory certified trades is that persons working or employed in such trades be lawfully so engaged before they are considered to be employees for certification purposes. Consequently, the Board has applied the *Apprenticeship and Tradesmen’s Qualification Act* in such cases in determining the list of employees in such bargaining units for certification purposes.

11. Pursuant to Regulations 52 and 59 (R.R.O. 1980) respectively under the *Apprenticeship and Tradesmen’s Qualification Act*, the trades of “plumber” and “steamfitter” are compulsory certified trades. The Board has determined that the labels “pipefitter” and “steamfitter” are synonymous for purposes of the *Labour Relations Act* (*D. E. Witmer Plumbing and Heating Limited*, *supra*, at paragraph 9). Consequently, a person must be either a journeyman or apprentice in the plumbing or steamfitting trades within the meaning of the *Apprenticeship and Tradesmen’s Qualification Act* to be able to lawfully work or be employed as a plumber or steamfitter respectively in the Province of Ontario.

12. In *P & M Electric (1982) Ltd.*, [1989] OLRB Rep. June 638, the Board observed that:

9. The *Apprenticeship and Tradesmen’s Qualification Act* is a statute of general application in the Province of Ontario. Its purpose is to regulate the training and qualifying of tradesmen and, in the case of a compulsory certified trade, to regulate the persons who can work at various trades so designated. Although it is not for this Board to enforce statutes like the *Apprenticeship and Tradesmen’s Qualification Act*, the Board is, in our view, obligated to not make decisions or proceed in ways which are inconsistent with laws of general application which are specifically directed at matters with which it must be concerned in the course of exercising its powers in performing the duties conferred or imposed upon it by or under the *Labour Relations Act*.

10. In our view, it would be inconsistent with the *Apprenticeship and Tradesmen’s Qualification Act* for the Board to find that persons who are neither qualified journeyman nor apprentices, within the meaning of that legislation, to be in a bargaining unit which relates to a compulsory certified trade for the purpose of certification proceedings before the Board. Further, the issue of community of interest in trade or craft bargaining units is determined primarily on the basis of the skills and working conditions which are characteristic of employees engaged in that craft or trade. In the construction industry, the community of interest question has largely been resolved by the development and operation of businesses and trade unions in that industry along trade or craft lines. Both the structure of the *Labour Relations Act* and the Board’s approach to the construction industry recognize that (see *Ellis Don Limited*, [1988] OLRB Rep. Dec. 1254, particularly at paragraphs 37-46). In our view, it would make no labour relations sense to include in a construction industry bargaining unit which relates to a compulsory certified trade, for the purpose of certification proceedings under the *Labour Relations Act*, persons who cannot lawfully work in the bargaining unit before or after certification and who share no real community of interest with electricians who are entitled to work in that trade pursuant to the *Apprenticeship and Tradesmen’s Qualification Act*.

(See also *McLeod et al. v. Egan et al.*, (1974) 46 D.L.R. 3rd 150) S.C.C.); *Re Ontario Hydro and Ontario Hydro Employees Union, Local 1000 et al.* (1983) 41 O.R. 2nd 669 (Ont. C.A.)). We

agree and find that reasoning equally apposite to this case which deals with the compulsory certified trades of plumbing and steamfitting.

13. Having regard to section 144(1) of the *Labour Relations Act*, the provisions of the *Apprenticeship and Tradesmen's Qualification Act* and Regulations thereunder, and the designation order referred to in paragraphs 1 and 8 above, the Board is satisfied that a person must be a journeyman or apprentice plumber or steamfitter, within the meaning of the *Apprenticeship and Tradesmen's Qualification Act* in order to be counted as an employee in a bargaining unit described in terms of such tradesmen in an application for certification which relates to the ICI sector of the construction industry.

14. This brings us to the question of whether welders said to be working in the plumbing or steamfitting trades can be considered to be employees in such a bargaining unit. We note that while welding is subject to the provisions of the *Boilers and Pressure Vessels Act*, R.S.O. 1980 Chapter 46, it has not been recognized as a separate trade either under the *Apprenticeship and Tradesmen's Qualification Act* or by the Board. Nor is either welding or welders the subject of any of the designation orders which have been issued to date. Indeed, a number of construction industry trade unions, including the applicant, claim some type of welding as part of their trade jurisdiction.

15. In the result, we find ourselves constrained to conclude that the only persons who perform welding functions who should be included as employees in a bargaining unit of plumbers and steamfitters are those who are either journeymen or apprentices in one or other of those trades.

16. Counsel for the applicant referred us to the Board's decision in *Rainscreen Metals Systems Incorporated*, [1989] OLRB Rep. May 482 in which the Board found it appropriate to stipulate in a clarity note that sheeters, sheeters' assistants and material handlers were employees in a bargaining unit of journeymen and apprentice sheetmetal workers. The trade of sheetmetal worker is a compulsory certified trade under the *Apprenticeship and Tradesmen's Qualification Act*. However, there is no indication that the appropriateness of that clarity note was put in issue in that proceeding. Nor is it obvious that the employees working as sheeters, sheeters' assistants and material handlers to which that clarity note refers were other than apprentice or journeymen sheetmetal workers. Finally, the "Sheet Metal Workers" designation entitles the employee bargaining agency named therein to represent journeymen and apprentice sheetmetal workers and sheeters, sheeters' assistants and material handlers. (There is no reference to welders in the designation order which governs this application). Consequently, the *Rainscreen* decision is readily distinguishable from this case.

17. Counsel for the applicant also complained about the unfairness that would result from a decision which precludes the applicant and its employee bargaining agency from becoming the exclusive bargaining agents of welders who are engaged in the plumbing or steamfitting trade but who are neither journeymen nor apprentice plumbers or steamfitters. He set out the example of construction industry employers who employ primarily or exclusively such welders. Indeed, it appears that it is not uncommon for both unionized and non-unionized employers to employ welders who are neither journeymen nor apprentice plumbers or steamfitters to perform work generally considered to be in the plumbing or steamfitting trade.

18. The Board is not unaware or unsympathetic to the dilemma faced by the United Association of Journeymen and Apprentices of the Plumbing and Pipefitting Industry of the United States and Canada in this respect, particularly since a significant number of its members are (so we understand) welders who are neither journeymen nor apprentice plumbers or steamfitters. The Board also accepts that, to the extent that it is possible, the Board's practices and policies should reflect and be responsive to the real world of labour relations rather than *vice versa*. However, the applicant cannot have it both ways. Either the *Apprenticeship and Tradesmen's Qualification Act* applies or it does not. The applicant has consistently argued in cases before the Board that it does apply, and the Board, as the *Irvcon Roofing & Sheetmetal (Pembroke) Ltd.* line of cases illustrates, has accepted that argument. As the Board pointed out in *P & M Electric (1982) Ltd.*, *supra*, it is not for this Board to enforce the *Apprenticeship and Tradesmen's Qualification Act* as such.

19. The Board is an administrative tribunal established by the *Labour Relations Act* to administer and apply that legislation. As such it is empowered and obligated "to determine all questions of fact or law that arise in any matter before it" (section 106(1)). However, as a creature of statute, the Board has no powers other than those conferred upon it by or under the *Labour Relations Act* (or

other legislation which delegates powers to it; see, for example, section 24 of the *Occupational Health and Safety Act*, R.S.O. 1980 Chapter 321). Consequently, although it is obliged to apply laws of general application the Board has only those powers which have been conferred upon it by statute. The Board has no separate or additional inherent or equitable jurisdiction to “do what it thinks is best”. In the Board’s view, the solution to any difficulties which may be occasioned by the conclusions it has found itself constrained to arrive at in this case are to be found, if at all, in another forum.

20. We understand that the Ontario Pipe Trades Council has requested that the Minister amend the present designation order so that the employee bargaining agency referred to in paragraph 1 above would be entitled to represent in bargaining in the ICI sector “all plumbers, plumbers’ apprentices, steamfitters and steamfitters’ apprentices and all qualified welders working in the plumbing and steamfitting trades”. Although that may be a solution, we observe that adopting that approach would seem to create a conflict between the designation order and the *Apprenticeship and Tradesmen’s Qualification Act*. On the other hand, this kind of apparent conflict has existed for some years between the sheetmetal workers designation and the *Apprenticeship and Tradesmen’s Qualification Act* (see *E. S. Fox Limited*, to be reported in [1989] OLRB Rep. July).

21. In the result, the Board is satisfied that it is unnecessary to include the clarity note requested by the applicant herein insofar as it relates to welders who are either journeymen or apprentice plumbers or steamfitters. The Board is also satisfied that the clarity note is not appropriate insofar as it relates to other persons employed as welders working in the plumbing or steamfitting trades since those persons are not properly included as employees in the bargaining unit applied for herein for certification purposes.

13. With respect, the approach taken in *O.J. Pipelines, supra*, is the correct one, and the Board’s comments in paragraph 37 of *Heritage Mechanical, supra*, whether or not obiter in that case, indicate a natural and proper extension of that approach.

14. When it comes to the *Apprenticeship Act*, the concern of the Board has been that employees are lawfully at work at the times material to the Board’s considerations in applications for certification. Accordingly, as decisions like *C.T. Windows Limited*, [1983] OLRB Rep. May 627 demonstrate, for purposes of an application for certification, the *Apprenticeship Act* is irrelevant when it comes to trades which are not compulsory certified trades. On the other hand, in more than 15 years of jurisprudence (beginning with *Irvcon Roofing & Sheet Metal (Pembroke) Ltd.*, [1981] OLRB Rep. Nov. 1594), the Board has consistently applied the *Apprenticeship Act* when it comes to employees engaged in compulsory certified trades by asking the question: were those employees lawfully engaged in that trade at the material times?

15. Clearly, an employee who holds an appropriate certificate of qualification in a compulsory certified trade can lawfully work in that trade. So can an employee who has entered into a contract of apprenticeship in the appropriate form which has been duly signed and approved by the Director of Apprenticeship. Section 17 of the current *Apprenticeship Act* provides that upon approval every contract of apprenticeship shall be registered by the Director.

16. Earlier on, in decisions like *Irvcon, supra*, the Board spoke in terms of registered apprentices, and expressed an apparent concern that bargaining units consisting of employees in compulsory certified trades be limited to employees who would be able to continue as employees in the bargaining unit after certification. In that respect, the Board suggested that persons who were not or did not become registered apprentices in the trade would not be able to continue as employees. With respect, that is both not necessarily the case and obscures the reason for the Board’s concerns about the status of employees under the *Apprenticeship Act*. Similarly, I respectfully suggest that the Board in the *Naylor Group Incorporated, supra*, case did not directly address the question suggested by what is now section 9(2) of the *Apprenticeship Act*, although it did address a provision in an applicable Regulation to the same effect, even though that issue was squarely before the Board in that case. To the extent that that

decision suggests that *only* employees who are journeymen or apprentices (as defined in the *Apprenticeship Act*) can lawfully work in a compulsory certified trade, and that only those employees should be included in a bargaining unit which consists of employees in a compulsory certified trade, I respectfully disagree.

17. The Board's functions do not include administering or enforcing the *Apprenticeship Act* as such. In applying the *Apprenticeship Act* in applications for certification or other proceedings (jurisdictional disputes, for example), the Board is concerned only with the *status* of employees under the *Apprenticeship Act* for purposes of the *Labour Relations Act, 1995*. It is patently obvious that under the *Apprenticeship Act* there are persons other than certified journeymen or registered apprentices who can lawfully work or be employed in even a compulsory certified trade.

18. It is true that under the *Apprenticeship Act* "apprentice" is in effect defined as being a person who has entered into a contract of apprenticeship, and that section 10(2) provides that no one other than an apprentice or person exempted under section 10(4) can work or be employed in a compulsory certified trade unless s/he is a certified journeyman. However, section 9(1) contemplates that a person can commence work in a trade without being either an "apprentice" as defined in the *Apprenticeship Act* or a certified journeyman, provided that such a person must "forthwith" apply to become an apprentice and within three months of commencing work in a trade file a contract of apprenticeship with the Director. Section 9(2) goes on to provide that a person who does not comply with section 9(1) within three months must *then* stop working in the trade until s/he either files a contract of apprenticeship with the Director, or the Director gives written authorization for that person to continue or resume work in the trade. It is apparent that the definitions and the provisions of sections 9 and 10 of the *Apprenticeship Act* must be read together, and that section 9 in effect provides a three month grace period for persons to become apprentices in the trade. Similarly, the requirement that a person "forthwith" apply for apprenticeship in a trade must be read in context, and requires only that a person do the things required to become an apprentice in the trade within three months of starting work in it. If s/he does so that is "forthwith" enough. Read as a whole, the *Apprenticeship Act* contemplates that a person who is neither an apprentice nor a journeyman in a compulsory certified trade can lawfully work or be employed in that trade for up to three months, or even for such longer period as the Director may authorize in writing. Accordingly, for the Board's purposes in an application for certification, a person who is neither an apprentice nor a journeyman in a compulsory certified trade but who has been working or employed in that trade for not more than three months has the status of an employee who is properly included in a bargaining unit which includes employees in the trade.

19. In the case of plumbers and steamfitters, the trades in issue in this proceeding, section 5 of the respective regulations for those trades make that even clearer, in that they specifically exempt persons who have been engaged in either trade for three months or less from the prohibition in section 10(2) of the Act, something which section 26 of the *Apprenticeship Act* provides can be done by regulation (see paragraph 11, above).

20. Further, any concern regarding the post-certification (or indeed the post-date of application) status of employees in Board decisions in the construction industry which were made prior to 1987, which includes both *Irvcon, supra*, and *Naylor Group Incorporated, supra*, must be read in the context of the Board's overall approach to construction industry applications for certification. It was not until the Board's decisions in *E & E Seegmiller Limited*, [1987] OLRB Rep. Jan. 41 and *Gilvesy Enterprises Inc.*, [1987] OLRB Rep. Feb. 220 that the Board settled on the certification application date as being the only relevant date for purposes of determining the number and identity of employees in a construction industry bargaining unit for purposes of an application for certification (or for an application for terminating the bargaining rights). Since then, the Board has consistently applied the date of application test in that respect, and as recently reviewed in *Ken Anderson Electric Inc.*, [1996] OLRB Rep.

Oct. 846, has extended its application to determining voter eligibility in construction representation proceedings. Accordingly, events which occur after the date of application, whether these relate to the *Apprenticeship Act*, to a voluntary or involuntary termination of employment, or otherwise affect a person's employee status, are irrelevant to the Board's considerations concerning a person's employee status on the date of application. The question is whether the status of a person is that of an employee lawfully working in the bargaining unit on the date of application, not what his/her status was on some previous date, or what it might be at some future time.

21. In argument, counsel for the U.A. referred to the employee bargaining agency designation for the U.A. and reminded the Board that this designation is for all journeymen and *apprentice* plumbers. Accordingly, argued counsel, anyone who is not an apprentice, within the meaning of the *Apprenticeship Act* cannot be included in the bargaining unit. In effect, the U.A. submits that being an apprentice within the meaning of its designation order requires more than merely working in the trade.

22. Many designations, both with respect to compulsory certified trades and trades which are not, are expressed in terms of journeymen and apprentices in the trade. For trades which section 10(2) of the *Apprenticeship Act* does not apply (i.e. non-compulsory certified trades) this has been liberally interpreted to require only that employees be working in the trade. For compulsory certified trades, it has been interpreted as requiring that an employee be lawfully engaged in the trade under the *Apprenticeship Act*. That is, where the term "apprentices" appears in a designation order, it has been liberally construed, and interpreted in accordance with what is required or permitted under the *Apprenticeship Act*. Accordingly, the terms of the designation orders, or more specifically the U.A. designation order, adds nothing to the analysis of this particular issue.

23. Further, the fact that Marsil may have been "out of ratio" on the date of application is irrelevant to the Board's considerations in an application for certification. First of all, this issue was not raised until the morning of the first day of hearing on April 28, 1997 (two full months after the vote was held), and as such it is untimely. Second, questions concerning the apprentice to journeyman ratio are matters of enforcement and administration of the *Apprenticeship Act*, something over which this Board has no jurisdiction. The fact that an employer is out of ratio does not affect the status of an employee of that employer under the *Apprenticeship Act*.

24. Finally, the U.A. argued that permitting persons who are neither journeymen nor apprentices (as defined in the *Apprenticeship Act*) in a compulsory certified trade to count as employees in the bargaining unit for purposes of an application for certification would permit an employer to gerrymander the list of employees in that respect to the prejudice of the trade union seeking certification (and presumably to the employees who support an application for certification in that respect). With respect, I am unable to understand this argument. It is only employees in the bargaining unit applied for on the date the application is made which "count" for purposes of an application for certification in any respect. The day on which an application for certification is made is within the sole control of the applicant trade union. On the other hand, it is possible that an employer could get wind of an application for certification, or might be otherwise sufficiently concerned that one might be made, that it would alter its complement of employees in an attempt to subvert an application before it was made. If such conduct interfered with the exercise of rights under the Act, it would be dealt with appropriately. If the employer's conduct was not unlawful, the trade union would have nothing to complain about, any more than an employer does when a trade union picks a certification application date which is particularly advantageous to it (like a Saturday or Sunday, for example). Although the word does carry a negative connotation, the fact is that not all gerrymandering is unlawful or otherwise prohibited. Additions to or deletions from an employer's complement of employees after the date of application cannot affect the "count" or the entitlement of individuals who are employees on the certification application date to vote.

25. In the result, a person who is not an apprentice or journeyman plumber or steamfitter on the date of application, but who spent a majority of his/her time on the date of application working in one of these trades is properly included in the bargaining unit herein and was entitled to vote, so long as that person had been working or employed in the trade for not more than three months. In this case, Petrushevski was working in the trade of plumber or steamfitter on the date of application. Although he was neither a registered apprentice nor a journeyman in either trade, he had not been working in the trade for more than three months at the time the application for certification was made. As a matter of status, Petrushevski was lawfully working or employed in the trade on the certification application date and he is therefore an employee in the bargaining unit and was entitled to vote.

III The Section 1(3)(b) Issue

26. I turn now to the question of Silvio Grande. The question is whether he was an employee in the bargaining unit on the date of the application, or should be excluded from the bargaining unit because he exercised managerial functions. The law and policy in this area are well settled, and I find it unnecessary to engage in any lengthy review or analysis of the jurisprudence generally, or of the arguments made or cases cited by counsel.

27. Section 1(3)(b) of the Act provides that:

1. (1) In this Act,

(3) Subject to section 97, for the purposes of this Act, no person shall be deemed to be an employee,

• • •

(b) who, in the opinion of the Board, exercises managerial functions or is employed in a confidential capacity in matters relating to labour relations.

This provision recognizes that the collective bargaining antagonism between managerial personnel on one hand and bargaining unit employees on the other is such that the former are presumed to be incompatible with the latter and should be excluded from bargaining units.

28. As the Board observed over 15 years ago in *Vagden Mills Limited*, [1982] OLRB Rep. June 968:

6. The Ontario *Labour Relations Act* does not contain a definition of the term “managerial functions”, nor are there any statutory criteria to guide the Board in reaching its opinion. The task of developing such criteria has been left to the Board to work out on a case by case basis, in recognition of the fact that the exercise of managerial functions can assume different forms in different worksettings, and in light of its own developing knowledge and experience in collective bargaining matters. But while the line between “manager” and “employee” is often difficult to draw in particular cases, there is one common theme which pervades all of the cases involving so called “first line” managerial employees of “foreman”: the extent to which the disputed individuals make decisions which significantly affect the economic lives of their fellow employees, thereby raising a potential conflict of interest with them. It was that kind of conflict which section 1(3)(b) was designed to avoid. Thus, in a collective bargaining context, such things as the right to hire, fire, promote, demote, grant wage increases, or discipline other employees should be regarded as manifestations of managerial authority, the exercise of which would be incompatible with participation in trade union activities as an ordinary member of the bargaining unit.

(See, also, the *Corporation of the City of Thunder Bay*, [1981] OLRB Rep. Aug. 1121 at paragraphs 3 and 4.)

29. In the construction industry, the managerial line of demarcation is generally drawn between non-working foremen and working foremen; that is, non-working foremen are generally excluded and

working foremen, who are analogous to “lead-hands” in an industrial setting, are generally included in a construction industry bargaining unit. But that is not always the case. In appropriate circumstances, a person who is a working foreman will nevertheless be excluded. The test which the Board has developed in that respect is this: a working foreman will be included in the construction industry bargaining unit unless s/he has an overall responsibility for a project, or can and does affect the employment status of employees. This test recognizes the conflict of interest which is created for a working foreman who exercises such responsibilities if s/he is included in the bargaining unit.

30. The corporate records produced by Marsil in this case are incomplete, and not particularly satisfactory. Nevertheless, I am satisfied on a balance of probabilities that Marco Grande is the sole owner, officer and director of the company. Silvio Grande is a brother of Marco Grande. The Act does not contemplate that a person will be deprived of rights which s/he would otherwise have under the Act, merely because s/he is related to the principal of an employer. However, this is something which can be taken into account as part of the context in which an issue of managerial exclusion is being considered.

31. The evidence reveals that Silvio Grande is a fifth year steamfitters apprentice. There is nothing in the evidence which suggests that, notwithstanding that the name “Marsil” is derived from a combination of the first names of *Marco* and *Silvio* Grande, Silvio Grande has had anything to do with the way in which Marsil operates, or the work which it has obtained. Nor does the evidence indicate that Silvio Grande has overall responsibility for Marsil’s operations at the Windermere House project (which is where the employees who are the subject of this application were working), or that he can or does affect the employment status or situation of Marsil’s employees. On the contrary, it is apparent that Marco Grande runs Marsil, and that he personally supervised the company’s operation on the Windermere House project.

32. Silvio Grande works with the tools alongside the other Marsil employees. He has the same hours of work, and takes his breaks at the same time as and with the other employees. There is no evidence that Silvio Grande directs, organizes or supervises the work of other employees in any managerial sense. The interesting salary arrangement which he has with the company (pursuant to which he is paid only \$400.00 per week, which generally results in him being paid at a lower hourly rate than any other employee on Marsil’s payroll, but which he receives each and every week regardless of how many hours he works or whether he works at all), is a product of the relationship and understanding he has with his brother, Marco Grande. I note that Silvio Grande is not the only one to receive a salary. Vince Gross, who apparently is an electrician who no one suggested was not an employee, also received a salary (of \$600.00 per week).

33. Marco Grande is clearly in charge of all aspects of the job when he is there. Marco Grande has been there every day except when he would leave in order to pick up employees’ paycheques which had been prepared for the employees by the company’s bookkeeper. He would do this once a week, usually on a Thursday, and he would usually be gone the whole day. Although Silvio was “in charge” of the job site while Marco was not there, that was true only in a lead-hand sense. Marco Grande would make sure that all the employees knew what work was to be performed while he was away before he left, and it is apparent that Silvio Grande had no authority to make any significant decisions in that respect, or with respect to Marsil’s employees, in Marco Grande’s absence. To the extent that Silvio Grande “supervised” the work of other employees, whether Marco Grande was there or not, he did so in no more than the way that many working foremen in construction industry bargaining units do.

34. It is also apparent that Marco Grande did all of the hiring and firing of employees. Silvio Grande had nothing to do with this. For example, Marco Grande hired Frandsen, Timperio, and all the other Marsil employees, and he personally terminates them, as he did Timperio. Nor did Silvio Grande

have anything to do with establishing wage rates or terms and conditions of employment for employees. In that respect for example, when Tony Timperio came onto the job site and questioned Silvio Grande about his wage rate, Silvio Grande told him that he would have to speak to Marco Grande. Similarly, when Morris Frandsen and Timperio became unhappy with the irregular way in which Silvio was "calling" breaks, they decided to establish a regular pattern, and they did so. There is no evidence that Silvio had any power to discipline employees, or that employees would have accepted any attempt by him to exercise such an authority. In that respect for example, when Silvio Grande began to chastise Timperio on February 24, 1997, Frandsen immediately leapt to Timperio's defence, and he and Timperio felt no compunction in arguing and telling Silvio Grande off. Indeed, Frandsen told Silvio that: "I don't work for you, I work for Marco": and neither Frandsen nor Timperio accepted Silvio's assertion of authority when during the squabble he attempted to puff himself up by suggesting that he was a part owner of the company. Finally, although Silvio Grande apparently had some dealings with the general contractor's superintendent, and with the plumbing inspector, there is no evidence indicating the nature of those dealings, or that these were any different than the dealings that other employees had in that respect.

35. Silvio Grande did collect the hours of Marsil employees for paycheque purposes. However, it is apparent that this was a clerical function. Not only is there no evidence to suggest otherwise, but what evidence there is indicates that any problems with paycheques were dealt with by Marco Grande.

36. In the result, Silvio Grande does not exercise any functions which can properly be characterized as being managerial, or which otherwise suggest that his presence in the bargaining unit would be incompatible with other bargaining unit employees or for collective bargaining purposes. Indeed, he has less authority than many construction industry working foremen have. The fact that Silvio Grande collected the hours, and that he was very much the eyes and ears of Marco Grande is not enough to justify a finding that Silvio Grande exercises managerial functions that he should be deemed not to be an employee. Nor does the fact that he clearly opposes this application for certification. Nor do these things taken together suggest that Silvio Grande should be excluded. It is not unusual for there to be working foremen or regular employees who, although they are not related by blood or marriage, have a close relationship with an employer and who ally themselves in opposing a trade union, either generally or specifically in an application for certification. This does not justify a managerial or other exclusion. Adding the fact that such an employee is actually related to a principal of the employer does not change this. (Indeed, the U.A. placed little emphasis on this as a consideration in this case.)

37. In my opinion, Silvio Grande is properly considered to be an employee for the purposes of the Act and this application.

38. In the result, the following persons were employees in the bargaining unit at the time the application was made, and were entitled to cast ballots:

Morris Frandsen
Tony Timperio
Teddy Petrushevski
Silvio Grande
Adrian Torti

39. The Registrar is directed to make the necessary arrangements to have the ballot box opened and the ballots counted. I will defer my decision with respect to the unfair labour practice complaint, and its effect on the application for certification, if any, pending the results of the vote.

1225-96-R Ontario Nurses' Association, Applicant v. Mount Sinai Hospital, Responding Party

Bargaining Unit - Certification - Reconsideration - Representation Vote - Union applying to represent bargaining unit of part-time and casual nurses employed by hospital - Board earlier directing that vote be held on fifth day after application was filed - Vote held on Friday before long week-end - Board rejecting employer's submission that employees had insufficient notice of the vote and insufficient access to the voting itself - Request to reconsider earlier decision ordering vote dismissed - Union describing appropriate bargaining unit as including all part-time and casual nurses "employed in a nursing capacity" - Employer submitting that bargaining unit should mirror existing full-time unit and so should be limited to those "engaged in nursing care" - Board concluding that part-time unit that would include nurses not involved in direct nursing care would cause employer labour relations problems of a substantial nature - Board accepting employer's bargaining unit description as appropriate - Final certificate issuing

BEFORE: *Roman Stoykewych*, Vice-Chair, and Board Members *Orval R. McGuire* and *R. R. Montague*.

APPEARANCES: *Risa Pancer*, *Mary Hodder*, *Cindy Forster* and *Esther Gaudet* for the applicant; *Ross Dunsmore*, *Beverly Lanigan-Gilmour*, *Melissa Sergiades* and *Nicole Wharton* for the responding party.

DECISION OF ROMAN STOYKEWYCH, VICE-CHAIR AND BOARD MEMBER ORVAL R. MCGUIRE; July 17, 1997

1. This is an application for certification filed with the Board on July 26, 1996. In a decision of the Board (differently constituted) dated July 31, 1996 (Board Member McGuire dissenting, decision issuing October 2, 1996), a vote was directed to be held within five working days to determine the wishes of employees in the following voting constituency:

all registered and graduate nurses at Mount Sinai Hospital employed in a nursing capacity for not more than twenty-four (24) hours per day, save and except Nursing Unit Administrators and Assistant Supervisors, persons above the rank of Nursing Unit Administrator and Assistant Supervisor, and persons regularly employed for more than twenty-four hours per week.

2. The ballots of those nurses not providing direct nursing care were ordered to be segregated and sealed in order to preserve the parties' positions in a dispute as to the description of the bargaining unit, which will be detailed below.

3. The vote was duly held on August 2, 1996. Under the arrangements established by the Board, polling was conducted at various locations in the hospital, on four separate occasions spanning the course of twelve hours. Upon a counting of the ballots cast, it is apparent that a substantial majority (75%) of employees who had cast their ballots had voted in favour of the trade union representing them. More specifically, of the 93 ballots cast and counted, 70 were marked in favour of the applicant. Four ballots were cast but not counted in light of the above mentioned dispute. The proportion of the approximately 250 employees eligible to vote who actually voted ranged between 33% and 39%, depending upon the parties' respective positions as to the bargaining description and composition.

4. Both in its response materials and in representations filed after the holding of the vote, the employer took the position that, because of the part-time and casual composition of the proposed

bargaining unit, in which many employees are not regularly scheduled to be present in the workplace, a vote held within a five-day period provided them insufficient notice of the holding of the vote and, further, could not and did not in the circumstances provide for sufficient access to the voting itself. It asked that the vote be held again on two separate days so as to provide a full opportunity for all affected employees to vote.

5. The matter came on for hearing before the present panel on August 19, 1996, both in the form of a reconsideration request relating to the decision ordering the representation vote, as well as a motion that the actual circumstances of the holding of the vote were such as to render the results of such voting an unreliable indicator of the employees' wish to be represented by the applicant.

6. In addition, the responding party took the position that the bargaining unit proposed by the applicant, in which it sought bargaining rights in relation to part-time nurses "employed in a nursing capacity" was inappropriate. Instead, it proposed that the union's bargaining rights be restricted to those nurses providing direct nursing care and thus, to those "engaged in a nursing care". More specifically, the employer took the position that the eight part-time nurses engaged in positions such as Nurse Educator, Nurse Practitioner and Nurse Clinician were not engaged in direct nursing care and, therefore, should not be included in the bargaining unit. In support of this position, counsel referred to the long-standing bargaining relationship between the parties, spanning some 24 years, in which bargaining rights regarding the *full-time* nurses were restricted to those "engaged in nursing care". It was submitted that the Board should find that a part-time bargaining unit description "mirroring" the full-time one is appropriate. Counsel referred the Board to its decision in *North Bay Nugget* [1994] OLRB Rep. Aug. 1137, and the summary of the Board's practice in respect of the "mirroring" of full-time and part-time units. As noted above, those ballots cast by nurses not engaged in direct nursing care were segregated and not counted in light of the dispute over the bargaining unit description, and the parties' submissions were considered at the hearing held on August 19, 1996.

7. After considering the parties' submissions, the Board determined in a "bottom line" decision dated August 23, 1996 that the employees concerned had had a substantial opportunity to express their wishes in the representation vote and that the employer's position in this respect were not accepted. The Board reserved further on the question of the appropriate bargaining unit description. However, since it was apparent that the ultimate decision with respect to the success of the trade union's application could not be affected by the resolution of the dispute over the bargaining unit description, a certificate on an interim basis was issued on September 10, 1996. The following are our reasons for rejecting the employer's submissions with respect to the propriety of the vote as well as our decision in relation to the outstanding bargaining unit issue.

Validity of the Representation Vote Held on August 2, 1996

8. As indicated above, the employer took the position that the five day period for the holding of the vote did not provide employees sufficient notice of the holding of the vote and that, in the circumstances, the employees were not provided with sufficient opportunity to vote because the vote was held on one day only. In this respect, the employer placed considerable reliance upon the fact that many of the "casual" employees in the unit do not attend work at the Hospital on a regularly scheduled basis and are typically engaged in employment elsewhere. It was submitted that requiring them to make arrangements to attend at a single day of voting, albeit held over a twelve hour period, is both unfair and not likely to make the voting process accessible to them. The employer further pointed out that the single day of voting proposed by the union, and accepted by the Board, was the Friday immediately preceding the August long weekend holiday. It is suggested that because scheduling of the casual nurses is at a relatively low point on such a day, the single day of voting directed by the Board is particularly unsuitable. Referring to the turn-out at the polling, which counsel characterized as "poor", it was

submitted that the evidence now available confirms the employer's position that the Board erred in ordering the vote in the manner it did in the July 31, 1996 decision.

9. By contrast, counsel for the trade union maintained that the voter turn-out, given the nature of the employee complement, was "good". Particular emphasis was placed upon the provisions of subsection 8(5) of the Act, which states:

8. . . .

(5) Unless the Board directs otherwise, the representation vote shall be held within five days (excluding Saturdays, Sundays and holidays) after the day on which the application is filed with the Board.

10. It was argued that there was nothing exceptional in the circumstances of the present case to cause the Board to depart from its practice of ordering votes within the five day period, and that therefore, there was no reason for the the Board to exercise its discretion to do otherwise.

11. The Board accepts the submissions of counsel for the employer that employee access to the representation vote procedure is a central value underlying the recent amendments to the *Labour Relations Act, 1995*. Under the new certification processes put into place by the Act, the Board is required to assess whether employees in a bargaining unit support an applicant trade union by means of a secret ballot vote, rather than the submission of membership evidence by the trade union. Particularly since the success of an application in the new system is determined by the majority of those employees who cast a ballot (section 10(1)), rather than 55% of all the employees in the unit, as was the case previously, it is self-evident that in such a system, a meaningful opportunity for employees to participate in the voting procedure is central to its operation and, indeed, may safely be said to underlie it.

12. Nevertheless, the interests inhering in access to the voting procedures are not the only labour relations values at play in the certification procedure as set out in the new Act, and in this respect, we do not accept as applicable in this context the model, proposed by counsel for the employer in argument, of "notice" to a legal proceeding. Rather, the Board must balance the participatory interests with those giving rise to the "quick vote" process contemplated by the statutory amendments. As noted above, subsection 8(5) of the Act provides that, in the usual case, the Board shall hold a representation vote within five working days of the date upon which the application is first received by the Board. The labour relations significance of the quick vote process in the overall balance of interests in the statutory scheme was described in the Board's recent decision in *The Corporation of the City of Toronto*, ([1996] OLRB Rep. July/August 552, application for judicial review dismissed [1997] OLRB Rep. Jan./Feb. 169):

83. The new scheme no longer permits certification based on membership cards alone (except perhaps in the special circumstances addressed in section 11 - see Appendix). Nor did the Legislature return to the pre-Bill 40 "hybrid model" where a representation vote could be triggered if card signers later filed a voluntary change-of-heart "petition". Under Bill 7, employees do not have to file a petition with the Board to signify a change of heart about the union or to prompt the Board to direct a representation vote. A representation vote has now become the exclusive method of testing employee wishes (apart from section 11) and is a requirement in every case.

84. However, in opting for "a vote in every case", the Legislature has not simply reverted to the former process for obtaining and conducting a representation vote. Instead, the Legislature has created an entirely new and quite different mechanism, relying on very quick 5-day votes, to measure the employee wishes, while at the same time limiting the employer's opportunity to improperly interfere with the employees' freedom of choice.

85. The secret ballot replaces the signed membership card as the means of testing the employees' appetite for collective bargaining. But like the previous card-based model, the new system is

designed to avoid a protracted “campaign” where the union and employer compete for the loyalties of employees. Because of the tight time frames, there is less opportunity for behaviour that could attract unfair labour practice charges (quite a number of these are filed each year and again see: Weiler: “Membership Cards vs. Representation Votes” mentioned above). *The new system makes it very clear that time is of the essence: it is not just “a vote in every case”; the statute contemplates a “quick vote in every case”.*

86. The 5-day time-frame mentioned in the statute is the most critical characteristic of the new certification scheme. It not only defines the nature of the process, it also requires the Board to develop new administrative structures in order to meet the 5-day target. Indeed, it is a target which we think the Board is required to meet if it can; moreover, it is a target which the Legislature must have intended that the Board *could meet* in most cases, applying the words of the new statutory scheme. The new certification process reflects a legislative trade-off: the elimination of the (relatively) *quick* card counting model for certification, and the substitution of the *quick* vote model instead.

13. Under the provisions of subsection 8(5), of course, the Board is provided a discretion to depart from the five day vote process, and as such, when the matter of accessibility of the process becomes an issue, it must determine whether the interests of participation and expedition, as discussed above, are appropriately balanced. However, it is the five day “quick vote” that is the model in the statute, and hence, it is a later vote that must be exception. In other words, the five day time frame must be seen to reflect already a presumptive balancing of the interests of accessibility and freedom from improper interference. Thus, the Board must determine, in the context of the ordering of a vote, whether there are exceptional or unusual circumstances which might render the five day time frame unfeasible, notwithstanding the need for expedition; and in the course of the examination of the circumstances of a vote already taken, to assess whether the circumstances were such as to cause it to doubt the validity of the vote as an expression of employee wishes.

14. While the components of such a balancing will, of necessity, depend upon the specific factual circumstances in each case, it is important to note that, by its very nature, a five-day legislative time-frame must be deemed to anticipate that certain employees, because of their absence from work, will not learn of the application and the holding of a vote in a timely manner and that, furthermore, other employees may be prevented from participating in the voting process itself due to other commitments. Employees take vacations, they take additional training, they are absent for medical reasons, they may be scheduled on shifts that may result in their absence from work for many days, or they may be absent from the workplace for substantial periods of time for any number of reasons. Indeed, it would be relatively rare for an employee complement of any size to be present at work in its entirety at any one time. All this is entirely normal and, if the statutory provision is to mean anything at all, is not something that in itself would cause the Board to determine that a five day vote would be inappropriate notwithstanding the fact that such employees would likely lose their access to the representation vote.

15. More to the point, in relation to the circumstances of this case, we do not agree that, as a general matter, there is anything unusual or exceptional about a workplace in which the employees do not attend on a regular or daily basis, and that, for that reason, do not accept that a five-day time-frame for a vote would be inapplicable. A casual and/or part-time work force is increasingly a feature of the labour market in Ontario, particularly in that portion of the work force not at present unionized. Absent any express statutory recognition, it must be assumed to be one to which the recently amended certification provisions were intended to apply. Indeed, the same “balancing” considerations apply to these employees as to those employees who attend work on a daily basis, although perhaps with greater force: while frequency of attendance by part-time and casual employees undeniably presents special problems relating to accessibility to the voting process, the typical circumstances of such employment, given its lack of security, may well require the Board to attend to the interest inhering in expedition all the more in order to limit the opportunities for improper interference in employee choice.

16. Notwithstanding these observations, however, the conditions adverted to in the employer's response materials are somewhat extreme and, in our view, gives rise to the very real concern that the holding of the vote in such circumstances could unduly curtail the employees' access to the voting process. Indeed, while we are not inclined (nor were we requested) to "second guess" the earlier panel's decision to hold the vote within five days on the basis of the materials then before it, we note that the combination of factors set out above could lead one to conclude that the access to the voting procedure could be substantially jeopardized.

17. The present panel of the Board, however, had the benefit of the representations of counsel, presented at the hearing, as to the circumstances of the holding of the vote. Upon our review of these matters, we were satisfied, on balance, that the concerns relating to access were adequately addressed. As to notifying employees of the vote, the Board notes that through the (entirely legitimate) efforts of both parties to secure the attendance of what they perceived to be their "supporters" at the polling booth, it is apparent that a substantial majority, if not virtually all, of the employees were advised of the circumstances of the vote, whether by telephone or by mail. This is not an entirely surprising occurrence. Unlike in the previous card-based system, where organizing campaigns were conducted for the most part in secret, it is apparent that the statutory requirement of a vote in every case has to a considerable extent served to publicize the manner in which trade unions acquire their bargaining rights. Thus, we are satisfied that whatever "deficiencies in notice" that might have arisen had the employees been forced to rely exclusively upon the Board's workplace notices and postings were amply cured by the parties' own efforts in attempting to secure the vote of their supporters.

18. Similarly, while we are concerned that the holding of the vote on the Friday immediately preceding a summer long weekend might have adversely affected the proportion of employees who voted, and while its being held on a single day may have rendered the process inconvenient or inaccessible to a number of employees, we are nevertheless not persuaded that the results of the vote that was held does not reflect the wishes of the employees. The Board notes that the polling was conducted over the course of approximately twelve hours, on four separate occasions staggered over various shifts, and was held at various locations in the hospital. While there may well have been some employees who would have found such voting arrangements inconvenient or impossible to be utilized, we are not persuaded that a substantial number of employees committed, for example, to employment elsewhere were prevented from voting. In this respect, it is important to note that, consistent with the usual practice of the Board, notices advising employees of the results of the vote and of their right to make submissions regarding the holding of the vote were posted in conspicuous locations in the workplace. Although argument was presented at the hearing that there were many employees who might experience such difficulties, no representations were received by the Board (let alone a meaningful number) asserting that this was in fact the case, nor was there any evidence that any, let alone a significant number, employees were in fact prevented from doing so because of the voting arrangements that had been made.

19. Accordingly, we were not persuaded that the representation vote held on August 2, 1996 did not accurately reflect the wishes of the employees to be represented by the applicant and therefore, declined to acceded to the responding party's request that the vote be held again.

Appropriate Bargaining Unit

20. As noted above, the applicant trade union seeks a bargaining unit description in which its bargaining rights extend to those nurses who are "employed in a nursing capacity" and hence, would include those nurses employed by the Hospital who are not engaged in the provision of direct nursing care. It was submitted that, in light of the Board's many cases on this matter, in which it has been made clear that the "nursing capacity" restriction is the "modern" limit for the representation of nurses,

(*Pembroke Civic Hospital*, [1993] OLRB Rep. Oct. 995) and on the principles set out in the Board's decision in *Hospital for Sick Children*, [1985] OLRB Rep. Feb. 266 the Board should find that the proposed unit description is appropriate.

21. The employer, by contrast, maintains that the present certification application is not an appropriate time for it to be forced to "modernize" its overall collective bargaining scheme. It points to many decades of collective bargaining with the applicant in relation to full-time nurses in which the bargaining unit has been restricted to those nurses engaged in direct nursing care, and maintains that the appropriate bargaining unit in the present circumstances is one that "mirrors" this long-standing practice. In the employer's submission, whatever might be an appropriate bargaining unit in the abstract must give precedence to its history of bargaining, based on the distinction between the two types of nurses, and which has produced administrative structures in which the employment of nurses not providing direct nursing care is dealt with separately from those who deal directly with patients. Among other things, it was submitted that the those nurses who do not provide direct nursing care have a separate community of interest from those that do, and for that reason, the Board should find the proposed bargaining unit to be inappropriate.

22. While there may appear, at first glance, to be a conflict between these practices or "policies" of the Board in relation to "mirroring" and those set out in the approach set out in the *Hospital for Sick Children* case and that, in effect, the Board is required to make a choice between the one or the other, upon an examination of the principles underlying both such practices, in reality, no such conflict exists, at least in the present application. As noted by the union in its argument, the Board's practice with respect to bargaining unit determination since the issuance of the decision in *Hospital for Sick Children* is a pragmatic one, based upon an examination of the labour relations circumstances of the workplace that the trade union proposes be subject to the processes of collective bargaining. As the Board's many subsequent decisions in relation to this question make clear, there is a wide range of possible configurations of bargaining units, even in a single workplace, and is limited, fundamentally, by whether or not its institution would present "serious labour relations harm" to the employer. This approach is reflective of the Board's experience of the extremely adaptable nature of the collective bargaining process, and attempts to balance, on the one hand, employees' interests in accessibility to collective bargaining with, on the other hand, the legitimate interests of employers that the initiation of collective bargaining not unnecessarily disrupt their established systems of labour relations.

23. We do not understand the reasoning underlying the Board's practice of "mirroring" full-time and part-time units to be addressing a different problem. Although the language of some of the pre-*Hospital for Sick Children* cases may reflect a somewhat inelastic attitude in relation to the Board's policy, it is apparent to us that the mirroring of full-time and part-time units is rooted in the Board's historical aversion to disturbing established bargaining structures. (See, in particular, *Sudbury Memorial Hospital*, [1982] OLRB Rep. Nov. 1722.) In other words, the Board has generally required that proposed part-time units replicate already-established full-time units because of its concern that the opposite result might cause, to use the language of *Sick Kids*, "serious labour relations harm".

24. In our view, the present circumstances are an example of such a situation. Given the essentially identical function performed by the nurses in the "excluded full-time" and the part-time nurses in question in the present application, the employer has instituted a common system of work-performance evaluation and monitoring, training, and career advancement that is, in turn, distinct from that governing the employment of either the part-time or full-time nurses who are engaged in the provision of direct nursing care. In effect, the employer has historically tended to treat the "excluded" nurses in a separate manner and has, over the years, developed a distinct system for the administration of their professional employment.

25. It may well be that this system ultimately derives from the historical practice of bargaining separately, rather than from some inherent feature of the work being performed or some other feature of these nurses' employment, and hence, we do not accept that the "community of interest" arguments advanced by the employer are of assistance in our resolution of the matter. Nevertheless, we accept that to now require the employer to treat the part-time nurses who are engaged in direct nursing care together with those that are not so engaged places that system into significant jeopardy. Having regard to all of the circumstances, we are persuaded that a part-time bargaining unit including nurses not involved in direct nursing care would cause the employer labour relations problems of a substantial nature.

26. Accordingly, the Board does not find such a unit to be appropriate for the purposes of collective bargaining. Instead, we accept the bargaining unit description proposed by the employer as appropriate and, having regard to the foregoing, to the aforementioned decisions of the Board, and to the provisions of the *Labour Relations Act, 1995*, find that the applicant is to be certified to represent the employees in the following bargaining unit:

all registered and graduate nurses of Mount Sinai Hospital in the Municipality of Metropolitan Toronto, engaged in nursing care, save and except Nursing Unit Administrators and Assistant Supervisors, persons above the rank of Nursing Unit Administrator and Assistant Supervisor, and persons regularly employed for more than twenty-four hours per week.

27. A final certificate shall issue.

DECISION OF BOARD MEMBER R. R. MONTAGUE; July 17, 1997

I dissent from the majority on the issue of the appropriate bargaining unit. I am not persuaded that a part-time bargaining unit including nurses not involved in direct nursing care would cause the employer labour relations problems, as none were proffered by the employer except to state that it would cause serious labour relations problems without articulation of what they were. As a result this leads me to the conclusion of being nothing but a figment of their imagination and at best mythical in nature. As a result I would have found the unit proposed by the Applicant as an appropriate bargaining unit.

1305-97-R United Steelworkers of America, Applicant v. North American Security Services Inc., Responding Party v. Canadian Union of Professional Security-Guards, Intervenor

Certification - Practice and Procedure - Representation Vote - Security Guards - Applicant union's earlier certification application withdrawn prior to representation vote - Union filing new application for different, but overlapping bargaining unit - Employer and intervening union asserting that new application should be barred - Board ordering vote and directing that "bar" issue be dealt with at hearing after the vote, if necessary - Applicant asking Board to order employer to provide it with names and addresses of all bargaining unit employees - Applicant's request denied - Board directing employer to mail copies of Board's decision and Notice of Vote to all individuals in voting constituency

BEFORE: *Laura Trachuk*, Vice-Chair, and Board Members *J. A. Ronson* and *H. Peacock*.

DECISION OF VICE-CHAIR LAURA TRACHUK AND BOARD MEMBER H. PEACOCK; July 18, 1997

1. This is an application for certification.

2. The Board finds that the applicant is a trade union within the meaning of section 1(1) of the *Labour Relations Act, 1995*.

3. Having regard to the agreement of the parties, the Board further finds that:

all employees of North American Security Services Inc. in the Province of Ontario, save and except Managers, Supervisors, Mobile Patrol Officers, Control Centre Operators, Sales/Service/Consultant Personnel, Head Office Support Staff (i.e. secretarial, clerical, etc.), Technicians and Investigators,

constitute a unit of employees of the responding party appropriate for collective bargaining.

4. It appears to the majority on an examination of the evidence provided with the application that not less than forty per cent of the individuals in the bargaining unit proposed in the application for certification were members of the union at the time the application was made.

5. Having regard to the agreement of the parties as to the appropriate bargaining unit, the Board directs that a representation vote be taken of the individuals in the following voting constituency:

all employees of North American Security Services Inc. in the Province of Ontario, save and except Managers, Supervisors, Mobile Patrol Officers, Control Centre Operators, Sales/Service/Consultant Personnel, Head Office Support Staff (i.e. secretarial, clerical, etc.), Technicians and Investigators.

6. The vote will be held on August 5 & 7, 1997. Other vote arrangements will be as directed by the Registrar and set out on the attached Notice of Vote and of Hearing.

7. All individuals who had an employment relationship with the responding party in the voting constituency on July 16, 1997, the certification application filing date, are eligible to vote. Employees having an employment relationship on July 16, 1997, the certification application filing date, include employees who were not at work on that date, so long as there is a reasonable expectation of their return to employment.

8. Voters will be asked to indicate whether or not they wish to be represented by the applicant or the intervenor in their employment relations with the responding party.

9. The applicant filed a previous application for part of the bargaining unit described in paragraph 3. That application was withdrawn with leave of the Board on July 11, 1997 prior to a representation vote. The responding party and the intervenor object to this new application on the grounds that the applicant should be barred from filing a new application as a result of withdrawing the previous one. The Board considers it appropriate to proceed with holding a representation vote. The issue with respect to the "bar" of this application will be dealt with at the hearing after the vote.

10. The responding party has raised an issue as to whether the applicant has provided membership evidence that indicates that not less than forty per cent of the individuals in the bargaining unit were members of the union at the time the application was made. This dispute appears to arise because the responding party asserts that there are 253 members of the bargaining unit and the union asserts that there are 228. In the circumstances, the Board considers it appropriate to hold the representation vote and to determine this issue at the hearing after the vote. The majority also considers it appropriate to count the ballots. Board Member Ronson dissents.

11. The applicant has requested that the Board direct the responding party to provide it with the names and addresses of all of the bargaining unit employees. The Board declines to do so at this time.

12. The applicant and the intervenor request that the Board mail notice of the vote to all of the employees in the bargaining unit. The responding party proposes that notice be provided through its e-mail system. The Board has more confidence that notice will reach the employees in these circumstances through the mail. The Board therefore hereby directs the responding party to mail copies of this decision, as well as the Board's "Notice of Vote and of Hearing" to all the individuals on its Schedules "A" and "B". Those schedules are to be provided to the applicant and the intervenor. If the applicant and the intervenor, after reviewing the lists, are of the view that notices should be sent to other individuals because they are included in the voting constituency outlined above, they must advise the Board and the responding party within twenty-four hours of receipt of this decision. The responding party must then mail notices to the additional persons named by the applicant.

13. The responding party is directed to post copies of this decision and of the "Notice of Vote and of Hearing" adjacent to the "Notice to Employees of Application for Certification". These copies must remain posted for 30 days.

14. Any party or person who wishes to make representations to the Board about any issue remaining in dispute which relates to the application for certification must file a detailed statement of representations with the Board and deliver it to the other parties, so that it is received by the Board within seven days (excluding Saturdays, Sundays and holidays on which the Board is closed) of the date on which the vote is taken.

15. The matter is referred to the Registrar.

DECISION OF BOARD MEMBER J. A. RONSON; July 18, 1997

I would seal the ballot box until any problems concerning the Board's jurisdiction have been resolved.

2947-94-R; 3010-94-R Ontario Pipe Trades Council and the United Association of Journeymen and Apprentices of the Plumbing and Pipefitting Industry of the United States and Canada, Local 527, Applicants v. **Ontario Hydro**, Responding Party v. Power Workers' Union, CUPE Local 1000, Intervenor #1 v. Labourers' International Union of North America, Local 1059, Intervenor #2 v. Electrical Power Systems Construction Association, Intervenor #3; Labourers' International Union of North America, Local 1059, Applicant v. Ontario Hydro, Responding Party v. Electrical Power Systems Construction Association, Intervenor #1 v. Power Workers' Union, CUPE Local 1000, Intervenor #2 v. Ontario Pipe Trades Council and the United Association of Journeymen and Apprentices of the Plumbing and Pipefitting Industry of the United States and Canada, Local 527, Intervenor #3

Bargaining Rights - Certification - Construction Industry - UA and Labourers' union seeking to represent members of their trades employed by Ontario Hydro in ICI sector - Board not accepting employer's assertion that relevant employees already represented by applicants under Electrical Powers Systems Construction Association collective agreements

BEFORE: *Lee Shouldice*, Vice-Chair, and Board Members *W. N. Fraser* and *G. McMenemy*.

APPEARANCES: *S.B.D. Wahl, J. Porter, S. Morrison and B. Christie* for the Ontario Pipe Trades Council and the United Association of Journeymen and Apprentices of the Plumbing and Pipefitting Industry of the United States and Canada, Local 527; *John Moszynski and Bill Casemore* for Labourers' International Union of North America, Local 1059; *M. Patrick Moran, Harvey A. Beresford, Bob Wright and R. Currie* for Ontario Hydro; *M. Patrick Moran, Harvey A. Beresford and Bob Wright* for Electrical Power Systems Construction Association; *Chris Dassios, W. Campbell and W. Wallace* for Power Workers' Union, CUPE Local 1000.

DECISION OF THE BOARD; July 18, 1997.

I. Introduction - What this Case is About

1. These are applications for certification in the construction industry. The applications were filed with the Board on November 17, 1994, prior to the effective date of the *Labour Relations Act, 1995*, and therefore are to be determined by reference to the *Labour Relations Act*, R.S.O. 1990, c. L.2, as amended (hereinafter referred to as "the Act"). The applicants (hereinafter referred to respectively as "the U.A." and "the Labourers") have applied under section 146(1) of the Act to represent members of their respective trades in the industrial, commercial and institutional sector of the construction industry in the Province of Ontario, and in all other sectors of the construction industry in Board Area 3.

2. We note that Board File 2947-94-R is an application brought by two separate trade union entities. The Ontario Pipe Trades Council is both part of the designated employee bargaining agency designated to represent journeymen and apprentice plumbers and steamfitters represented by the affiliated bargaining agents described in the designation, and is also itself an affiliated bargaining agent of that designated employee bargaining agency. Local 527 is, of course, a constituent trade union of the Ontario Pipe Trades Council and an affiliated bargaining agent of the designated employee bargaining agency. It is not appropriate for more than one trade union to bring a single application for certification (see *Centro Mechanical Inc.*, [1996] OLRB Rep. Sept./Oct. 762). We will comment further on this below.

3. These two applications are brought in relation to work performed on the installation of a steam and a condensate line in the Bruce Energy Centre, adjacent to the Bruce Nuclear Power Development in Bruce County, Ontario. For the purposes of this decision, we will refer to the separate steam and condensate lines collectively as "the steam line" or "the steam pipeline". Although the lines are entirely different in nature and in purpose, during the course of the hearing the parties, for the most part, referred to the lines as "the steam line" or "the steam pipeline", and there is no reason not to do so here. It should be kept in mind, however, that there are, in fact, two separate lines which are the subject of these applications for certification.

4. There are numerous issues which have been raised by the parties in their pleadings. By way of decision dated July 7, 1995, the Board (differently constituted) dealt with a number of preliminary issues, and directed that a pre-hearing conference be convened to narrow or settle the issues in dispute. A pre-hearing conference was held on July 19, 1995, before a Vice-Chair of the Board. During the course of that pre-hearing conference, the parties agreed upon the order of proceeding.

5. The first issue to be considered, and the issue determined by this decision, was described by the parties at the pre-hearing conference as "the application, scope and coverage" of the Electrical Power Systems Construction Association collective agreements (hereinafter referred to as "the EPSCA agreements"). Ontario Hydro asserts that the employees who would be included in the bargaining units sought by each of the applicants are already represented by the applicants under the EPSCA agreements. The applicants take the contrary position. It was agreed by the parties that the Board would issue a

ruling respecting this first issue prior to proceeding with any of the other issues. It was also agreed by the parties during the course of the hearing that, for the purposes of any further issues litigated before the Board, the evidence adduced on this issue could be referred to by the parties, and the findings of fact made by the Board could not be challenged.

6. Although the collective agreement language governing the relationship between Ontario Hydro and the U.A., on the one hand, and Ontario Hydro and the Labourers, on the other, is slightly different, the critical language is almost identical in both of the EPSCA collective agreements. The relevant language in the U.A. collective agreement reads as follows:

1.1 EPSCA recognizes the Union as the exclusive bargaining agency for a bargaining unit as defined in Section 1.3 engaged in

i all construction industry work under the responsibility of Design and Construction Branch/ENCON Services Branch (including Generation Projects Division and Transmission Systems Division),

ii all Major* construction industry work which is tendered/contracted for all other Divisions of Ontario Hydro and,

iii work performed by the Design and Construction Branch for any Operations branch of Ontario Hydro where it has been determined by that Operations branch that there does not exist internally the expertise or the current staff to perform the work.

This work shall be performed in the Province of Ontario on Ontario Hydro property for the bulk power system. The work encompasses:

- construction of new facilities
- additions to existing facilities
- modifications
- rehabilitation
- reconstruction of existing facilities

For the purpose of clarity, the bulk power system comprises generating stations, hydraulic works, heavy water facilities, transmission lines (voltages over 50KV) and transmission stations, micro-wave and repeater stations save and except the building of commercial-type office facilities at urban locations remote from operating facilities.

The asterisk after the word “major”, above, refers to a letter of understanding which is not relevant to the issue at hand.

7. The Board heard a great deal of evidence and argument focusing on whether the work in question was “on Ontario Hydro property for the bulk power system”. These are the key concepts in dispute. As noted above, the collective agreement binding Ontario Hydro and the Labourers contains similar, though not identical, language. The differences in language will be addressed below.

8. The hearing of the first issue in these proceedings commenced on October 23, 1995, and continued for 28 hearing days over the course of 14 months, coming to completion in December, 1996. The Board heard the testimony of nine witnesses and marked 213 exhibits during the course of the hearing. Although there were some inconsistencies in the evidence heard by the Board, we are satisfied that each witness testified to his recollection of the events in question to the best of his ability and that it is unnecessary to comment on the relative credibility of the witnesses.

II. Decision

9. Having regard to all of the evidence before the Board, we are of the view that the employees who form the basis of the bargaining units sought by each of the applicants were not represented by either of the applicants under its respective EPSCA agreement on the certification application date.

10. Our reasons for reaching this conclusion are set out immediately below.

III. The Facts

(a) The Bruce Nuclear Power Development

11. As noted above, these applications for certification were brought by the applicants with respect to work being performed on the site of the Bruce Energy Centre (hereinafter referred to as “the B.E.C.”) in Bruce County, Ontario. The B.E.C. is slightly more than two miles due east of the Bruce Nuclear Power Development (hereinafter referred to as “the B.N.P.D.”), which is located on the eastern shore of Lake Huron, between Kincardine and Port Elgin.

12. By way of background, within the boundaries of the B.N.P.D. are two operating nuclear generating stations (hereinafter referred to as “Bruce A” and “Bruce B”, respectively), a heavy water plant, a steam plant, waste storage facilities, a nuclear training centre, and numerous other administration and service buildings, some of which will be mentioned below. All of the buildings on site were built by EPSCA trades in accordance with the EPSCA collective agreements in force at the time. At the B.N.P.D. site, Ontario Hydro employs approximately 4,700 individuals. Of primary significance in these proceedings, the B.N.P.D. also supports a bulk steam system.

13. The B.N.P.D., as a nuclear power development, has a large chain link fence which surrounds the site, approximately two kilometres from the lake. The fence is intended to keep individuals from entering the site. Beyond the fence, however, Ontario Hydro has also established a “two mile administrative boundry” which runs east from the lake. Ontario Hydro has purchased much of the land which is encompassed by this boundary. The purpose of the boundary is essentially that of ensuring safety: at the Bruce Heavy Water Plant, a chemical process involving hydrogen sulphide gas and large amounts of steam is utilized to separate heavy water from ordinary lake water. Hydrogen sulphide gas is highly toxic. In the event of an emergency, the administrative boundary would ensure easy accessibility by emergency staff and also ensure control of the area for evacuation purposes.

14. As noted above, as part of the generation of nuclear energy, steam is produced in order to separate heavy water from light water. Heavy water is utilized as a coolant in the nuclear reactors. This separation process is completed at the Bruce Heavy Water Plant which is located on the B.N.P.D. site. The steam which is utilized in this process is generated by the four reactors at Bruce A and transported by way of four pipes to the adjacent Steam Transformer Plant, and subsequently to the Heavy Water Plant.

15. It became evident to Ontario Hydro many years ago that the nuclear reactors at Bruce A could create steam in quantities well in excess of that required to produce heavy water at the B.N.P.D. site. Accordingly, excess medium pressure steam has been utilized by Ontario Hydro to provide heat energy for various buildings on the site. In order to transport this steam to the site locations, a pipeline was constructed using Ontario Hydro construction forces pursuant to the EPSCA collective agreements. A condensate line permits for the return of the steam, in liquid form, to the Steam Transformer Plant for regeneration to steam energy. Accordingly, the system is in the nature of a “closed loop”. There is no major facility on the site without steam heating. Most significantly, it was determined by management of

Ontario Hydro in the early 1980's to utilize the excess steam capacity at the B.N.P.D. to encourage development of the B.E.C., which is described below.

16. As noted above, the steam which is generated at the B.N.P.D. has as its genesis Bruce A. That steam is transported through four steam lines to the Steam Transformer Plant, and then in two, 66" pipes, to the Heavy Water Plant. From there, a number of smaller steam lines have been constructed in order to permit for distribution of steam throughout the B.N.P.D.. For the purposes of these proceedings, it is sufficient to observe only that there is a 24" main arterial steam line and a 10" condensate line that travels (roughly) due east from the Bruce Heavy Water Plant. These lines travel beyond the perimeter fence and the two mile administrative boundary, and terminate at the B.E.C., where the lines branch out to permit delivery of steam to many of the businesses located at the B.E.C..

17. It is significant to note that the steam pipeline and the condensate line are physically located, as they proceed east to the B.E.C., on a "power corridor" which runs east from the B.N.P.D. to the Wingham Transmission Station. The power corridor is located on land owned by Ontario Hydro, and runs by the B.E.C. on the south side. It is from the power corridor that the steam pipeline enters the B.E.C.. The power corridor is the land upon which the main electrical grid lies, permitting the transmittal of electrical power from the B.N.P.D. to consumers in Ontario. There are three sets of power lines which travel east on the power corridor, one which delivers 500 kilovolts ("KV") of power, one which delivers a further 250 KV of power, and a third which delivers 44 KV of power.

(b) The Bruce Energy Centre

18. The B.E.C. is an industrial park which lies to the east of the B.N.P.D.. In the late 1970's a study was commissioned by Ontario Hydro to consider the feasibility of utilizing the excess steam created by Bruce A to support the development of commercial activity near the nuclear plant site. Various initiatives were subsequently undertaken to develop a commercial approach to such an industrial park. To a great extent, the theory of the B.E.C. is to attract industries in which the waste product of one industry is a feedstock of another, so as to "add value" to the location.

19. In 1981, the *Power Corporation Act*, the legislation which creates Ontario Hydro and provides it with certain powers and authority, was amended in order to permit Ontario Hydro to sell steam. Regulations regarding the production and sale of steam energy were enacted by the Lieutenant Governor in Council in 1983. The parties directed much of their argument towards the scope and nature of the authority provided by the *Power Corporation Act*, and accordingly we will address the legislation in much greater detail below. For the purposes of this overview, it is sufficient to state that it appears that there was some question as to the authority of Ontario Hydro to sell steam (or "heat energy") for commercial purposes at the B.E.C., and accordingly the legislature amended Ontario Hydro's governing legislation to alleviate any concerns.

20. Since the amendments to the legislation, the B.E.C. industrial park has developed somewhat. As at the certification application date, six companies had located at the B.E.C.: Bruce Tropical Produce Inc., a nine acre greenhouse that grows tomatoes year round; Commercial Alcohols Inc., a company that manufactures ethanol from corn, and produces vodka and alcohol for mouthwash; Bruce Agra DeHy Inc., which takes corn and canola and dehydrates it into livestock feed, primarily for the equine market; St. Lawrence Technologies Inc., which conducts research into the use of chicory as an agricultural product; Bruce Agra Foods Inc., which produces apple concentrate; and, most significantly for the purposes of these proceedings, Bi-Ax International Inc. (hereinafter referred to as "Bi-Ax"), a plastics extrusion plant which manufactures plastic sheeting in the nature of stretch wrap. As at the certification application date, each of these companies had executed "Steam Sale Agreements" with Ontario Hydro, some of the terms of which will be outlined in more detail below.

21. The responsibility for the development of the B.E.C. has been transferred amongst a number of divisions of Ontario Hydro since its inception. For the purposes of these proceedings, it is important to note that in 1994 responsibility for the B.E.C. was transferred from Ontario Hydro International to Ontario Hydro Nuclear. As part of that transfer of responsibility, representatives of Ontario Hydro Nuclear met with the various industries at the B.E.C. and it was determined that an outstanding obligation was owed by Ontario Hydro International to Bi-Ax. At that time, Bi-Ax was not in receipt of heat energy from the B.N.P.D., and it was determined that Ontario Hydro International had promised to extend the steam line (which had been constructed into the B.E.C.) in order to permit Bi-Ax access to heat energy. As will be described in greater detail below, it was decided by Ontario Hydro to extend the steam line by January 1, 1995, in order to permit Bi-Ax to access the heat energy by that date.

22. At this stage, it is helpful to outline the development of the steam line since its inception in the early 1980's.

(c) Development of the Steam Line

23. During the course of the hearing, the parties made reference to the development of the steam line by referring to four separate "phases" of the line's construction. Appropriately, the four phases were referred to numerically; i.e. Phases One, Two, Three and Four. We will continue in this decision to make references to the separate portions of the steam line by reference to the numerical phase.

(i) Phase One

24. As noted above, Ontario Hydro has created a two mile "administrative boundary" around the B.N.P.D.. The eastern-most point on the two mile administrative boundary falls just west of the B.E.C.. The first phase of the construction of the steam line was from the B.N.P.D. to the various facilities on the site, and subsequently east to the two mile administrative boundary. This construction was completed in 1985. The pipeline consists of a 24" steam line and a 10" condensate return line. The construction was completed entirely by Ontario Hydro forces, pursuant to the applicable EPSCA collective agreements. All of the land upon which Phase One of the steam pipeline was constructed is owned in fee simple by Ontario Hydro.

25. Phase One of the steam line terminated at a point which was referred to in much of the documentation, and by the witnesses at the hearing, as the "delivery gate". The "delivery gate" is not, as one might think, a gate or fence, but rather a notional point "up the hill" from the B.N.P.D. towards the B.E.C.. There was a great deal of testimony directed towards identifying just where the "delivery gate" was located, and whether the "delivery gate" and the "two mile administrative boundary" were co-terminal points. In our view, it is evident that the "delivery gate" is a concept which was intended to identify the terminal point of the two mile administrative boundary on the Ontario Hydro power corridor. Consider, for example, an agreement for the delivery of heat energy between Ontario Hydro and Bruce Tropical Produce Inc. (Ex. 96), dated May 25, 1988, which defines the term "delivery gate" as follows:

"Delivery Gate" means that point located on Hydro's 500,000 volt transmission line right-of-way at the boundary of Lots C and D, Concession IV in the Township of Bruce, the boundary also known otherwise as BNPD's 2 mile Administrative Boundary.

We are satisfied that the concept of the "delivery gate" and the point on the power corridor which marked the 2 mile administrative boundary are one and the same points for the purpose of the steam pipeline.

26. As noted above, there would appear to be little dispute that all of the work related to the construction of the steam pipeline on the B.N.P.D. site, and beyond the B.N.P.D. site to the "delivery

gate”, including the fabrication of the pipe, was performed by members of the various construction trades on site, pursuant to the terms of the respective EPSCA collective agreements. There was no suggestion that any of this was controversial. It was the testimony of Mr. Steve Morrison, the Chief Steward of the U.A. at the B.N.P.D. during much of the 1980’s and during the 1990’s, that Ontario Hydro management regularly represented to the construction trades that the geographical limit of the EPSCA collective agreements, for the purposes of the B.N.P.D., was found at the edge of the two mile administrative boundary. Although this will be discussed in further detail below, there is also substantial documentary evidence which establishes that Ontario Hydro was of the view that the two mile administrative boundary was the relevant geographic limit of the EPSCA agreements.

(ii) Phase Two

27. Phase Two of the steam pipeline was constructed from July, 1985 through to September or October, 1986. Again, there is little dispute with respect to the basic factual background of its completion. Phase Two of the steam line runs approximately 200 feet due east from the “delivery gate”, then due northeast across the power corridor to and beyond the property line of the B.E.C., to the northeast portion of the B.E.C.. Once again, the pipeline consists of a 24” steam line and a 10” condensate return line. This phase of the steam line was described in evidence as a “large power corridor” intended to service many different businesses at the B.E.C.. In fact, it would appear from the documentary evidence that it was the expectation of the builder of this stage of the steam line that the steam line would provide many businesses at the B.E.C. with access to steam energy.

28. Phase Two of the steam line was designed and engineered by Ontario Hydro but constructed by an entity known as Resolute Development Corporation (hereinafter referred to as “Resolute”), and was completed by employees of Resolute, rather than the construction trades of Ontario Hydro. The funding for the construction of Phase Two of the steam line came from the government-funded “BILD” program - although Ontario Hydro actually paid the monies for the construction of the steam line to Resolute, the monies for the project were obtained by Ontario Hydro from the provincial government’s program. It should be noted here that the businesses on the B.E.C. were responsible, during Phases Two, Three, and Four, for the cost of “hooking up” the steam line to their operations. That is, the cost of the steam infrastructure beyond what was referred to as “the terminal isolating valve” (approximately at the customer’s lot line) was the responsibility of the business receiving the heat energy.

29. At this point it is helpful to identify some of the key players in the development of the B.E.C. One of the prime movers behind the B.E.C. concept has been, and still is, Mr. Norman (“Sam”) MacGregor. Mr. MacGregor is a businessman in the Bruce County area and has owned, at various times, much of the land in and around the B.E.C.. He also has had, to varying degrees, an interest in one or more of the businesses located in the B.E.C. Mr. MacGregor was the guiding mind behind Resolute and a company named Boiler Beach Park Limited (hereinafter referred to as “Boiler Beach”). The evidence suggests that at times Ontario Hydro considered Boiler Beach and Resolute to be substitutable entities. However, it would appear that Boiler Beach was a wholly-owned subsidiary of Resolute and was the corporate entity that held property interests of Mr. MacGregor in or about the B.E.C. In the mid-1980’s, it was Resolute that had entered into an agreement with Ontario Hydro to develop the B.E.C. as an industrial park.

30. Bruce Energy Centre Limited was incorporated as the development arm of Canadian Agra Corporation, the latter also being a company in which Mr. MacGregor participates. Within the last few years, Bruce Energy Centre Limited has changed its name to Ontario Interlink Industrial Park Limited. Canadian Agra Corporation has an interest in a number of the businesses at the B.E.C., including Bruce Agra Dehy Inc., Bruce Tropical Produce Inc., Bruce Agra Foods Inc., and St. Lawrence Technologies Inc.

31. Near the completion of this phase of the steam pipeline, the U.A. applied to the Board for a certificate to represent plumbers, plumbers' apprentices, and steamfitters and steamfitters' apprentices in the employ of Resolute in the I.C.I. sector of the construction industry, and in all other sectors of the construction industry in Board Area 3. The application was successful and the Board ultimately issued the U.A. the usual two certificates on July 23, 1986. At the time, neither Ontario Hydro nor EPSCA was identified by either the U.A. or Resolute as a potentially interested party in the proceeding.

(iii) Phase Three

32. With this background established, we return to the completion of the steam line. In 1990, the third phase of the steam line was completed. Its completion was to permit the delivery of steam energy to what is now Bruce Agra Dehy Inc.. It appears from the engineering drawings entered as an exhibit that the Phase Three pipeline consists of a 16" steam line and a 6" condensate return line. The third phase of the steam line feeds off from the second phase of the line, follows the east side of Farrell Drive, eventually goes under the road to the west side of Farrell Drive, and moves west between Lots 3 and 4 of the subdivision, allowing access to the steam line for St. Lawrence Technologies Inc. (which had not been built in 1990) and Bruce Agra Dehy Inc.. These Lots were owned at the time of the construction of Phase Three by Bruce Energy Centre Limited, having been purchased from Boiler Beach in February, 1989.

33. Once again, there appears to be little dispute as to the circumstances surrounding the construction of the third phase of the steam line. The steam pipeline was constructed by Canadian Agra Corporation, which had subcontracted the design of the line to Brian G. Butler & Associates (1985) Ltd., a firm of consulting engineers, at the cost to Ontario Hydro of approximately \$800,000. Ontario Hydro did not let any of the construction contracts for Phase Three of the steam pipeline, but had control over the choice of subcontractor, cost and design of the steam pipeline. Phase Three of the steam pipeline was completed by individuals employed by Canadian Agra Corporation, and not Ontario Hydro. The EPSCA agreements had no relevance to the construction of this phase of the steam line.

34. Ontario Hydro paid Canadian Agra Corporation for its share of the cost of the construction of the third phase, and anticipated a formal agreement between Canadian Agra Corporation (or, it would appear, a related holding company) and Ontario Hydro in which the ownership of the steam line would be passed to Ontario Hydro. No such agreement was entered into evidence, but there was no dispute amongst the parties that Ontario Hydro owns the piping infrastructure at the B.E.C. (up to and including the terminal isolating valves of each business).

(iv) Phase Four

35. As noted above, the transfer of responsibility for the B.E.C. from Ontario Hydro International to Ontario Hydro Nuclear caused the latter to investigate the obligations owed to various companies in the B.E.C.. During the course of its investigation, Ontario Hydro Nuclear discovered that Bi-Ax had been promised access to the steam line. Bi-Ax is located on Lot 1 of the subdivision, and in order to make the steam line accessible by Bi-Ax the steam pipeline would have to be extended north along the west side of Farrell Drive, from Lot 3 (where St. Lawrence Technologies had been built), over or around Lot 2 (at the time, a vacant lot), to Lot 1. It was determined by Ontario Hydro that the steam line would be extended to permit Bi-Ax to hook into the steam pipeline by January 1, 1995. It is evident that this phase of the steam pipeline consists of a 10" steam line and a 4" condensate return line.

36. Although the evidence is somewhat sketchy, it would appear that rumours to the effect that the steam line at the B.E.C. might be extended floated around the B.N.P.D. during the early summer of 1994. It was, at that time, believed by Ontario Hydro that the contract for the work would be let by "the

B.E.C.”. It was not clear whether the contract would contain reference to the Labour Requirements provisions of the EPSCA collective agreements. Draft tender documents to this effect were created by Mr. Mick Fitt, a Field Engineer in the Projects and Modifications division of Ontario Hydro.

37. All of this changed, however, in September, 1994. On September 27, 1994, a meeting was convened in the office of Mr. Bill Cushing, the Manager of Capital Modifications of Ontario Hydro responsible for the Phase Four construction. Attending at that meeting was Mr. Dave Homan, who was, at that time, the Assistant Divisional Superintendent at Bruce A, Mr. Fitt, and Mr. Bev. Jennings, Ontario Hydro’s Engineering Resource Coordinator. During the course of this meeting there was a discussion regarding the possibility of utilizing Ontario Hydro construction forces to construct Phase Four of the steam pipeline. There was, at the time, a likelihood that some layoffs would be required of EPSCA tradespersons due to a lack of work, and Ontario Hydro felt that it would be preferable to maintain these tradespersons in its employ rather than laying them off.

38. At the end of the meeting, Mr. Homan was charged with two actions. First, he was to contact Ontario Hydro labour relations to discuss the appropriateness of performing the steam pipeline work at the B.E.C. with Ontario Hydro construction forces pursuant to the EPSCA collective agreements, because there was some question amongst Ontario Hydro management as to whether the work in question fell within the Electrical Power sector of the construction industry. Secondly, Mr. Homan was to speak to the Chief Stewards of each of the EPSCA trades and obtain from them written authority to have the steam pipeline work performed under the EPSCA collective agreements. As the project was to be completed before the end of the year, there were some time pressures imposed on obtaining this information and these consents. Accordingly, immediately after the meeting, Mr. Homan asked Ms. Lesley Hall, the EPSCA representative on site, to contact Ontario Hydro labour relations and to enquire as to whether Ontario Hydro could utilize the building trades on site to perform this work. He also contacted Mr. Morrison of the U.A., who was the Chairman of the Chief Stewards Committee at the B.N.P.D., and requested that Mr. Morrison contact the Chief Stewards of all of the EPSCA trades and advise them of a meeting in Mr. Homan’s office later that morning.

39. As requested by Mr. Homan, almost all of the Chief Stewards of the trades on the B.N.P.D. site met in his office later that morning. Mr. Morrison arrived at Mr. Homan’s office in advance of the other chief stewards and spoke to Mr. Homan. Mr. Homan indicated to Mr. Morrison that Ontario Hydro would require something signed from the unions before the work at the B.E.C. could be done by Ontario Hydro construction trades. It was Mr. Morrison’s testimony, which we accept, that he responded to that comment by saying “yeah, a signed I.C.I. agreement”. Mr. Homan could not recall such an exchange but conceded that it may have occurred.

40. Once the Chief Stewards had assembled in Mr. Homan’s office, a brief discussion occurred. Mr. Homan indicated to those in attendance that in order for the Ontario Hydro construction forces to perform the Phase Four steam pipeline work at the B.E.C., Ontario Hydro would require from the offices of the various trade unions written authorizations permitting the work to be performed under the EPSCA agreements. Mr. Homan conveyed to those present the tight timelines for the project. Although Mr. Homan could not recall either Mr. Morrison or Mr. Casemore (in attendance on behalf of the Labourers) making any comment in response to his statements, he stated that, based on comments he did hear at the meeting, he felt that all of the Chief Stewards were “in favour of doing the work”.

41. Subsequently, Mr. Morrison and Mr. Casemore attended at Mr. Homan’s office to discuss with Mr. Homan this request for written authorization. Mr. Morrison had spoken to Mr. Jack Porter, Business Manager of the U.A., and had been instructed to advise Mr. Homan that no written authorization as requested would be forthcoming from the U.A.. There is some difference in the testimony as to when this attendance in Mr. Homan’s office occurred. For the purposes of this decision, it is unnecessary

to resolve the question, because it is undisputed that, prior to the attendance at Mr. Homan's office by Mr. Morrison and Mr. Casemore, Mr. Homan had been advised by Ms. Hall that Ontario Hydro labour relations had indicated that he did not require the written authorizations of the construction trade unions in order to perform the work at the B.E.C. with Ontario Hydro tradespersons under the EPSCA collective agreements.

42. When Mr. Morrison and Mr. Casemore attended at Mr. Homan's office, Mr. Homan advised them immediately that he had been told that it was unnecessary for him to obtain written authorizations from the construction trades, and accordingly neither Mr. Morrison nor Mr. Casemore told Mr. Homan of his union's position. Mr. Morrison was once again asked to gather the Chief Stewards of the various construction trades in Mr. Homan's office, which he did. At that gathering Mr. Homan confirmed that it was unnecessary for the Chief Stewards to obtain the written authorizations previously requested. In fact, Mr. Homan did, eventually, receive one or two written authorizations from various trades on the site. However, it was clear from his testimony that the decision to proceed to perform the work at the B.E.C. with Ontario Hydro tradespersons under the EPSCA collective agreements was based upon the advice he had received from Ontario Hydro labour relations, as conveyed by Ms. Hall.

43. Work on the project at the B.E.C. commenced on or about October 24, 1994, with Ontario Hydro direct hires. A number of individuals were referred to the site by way of the various hiring halls of the trades involved in the construction of the steam line. The evidence indicates that five members of the U.A. and two members of the Labourers were referred to the site, by way of EPSCA help requisitions, in order to perform work related to the construction of the steam pipeline.

44. There was a great deal of evidence called by the parties addressing the question of whether the parties applied the EPSCA collective agreements to the work performed at the B.E.C.. As noted above, certain workers were obtained by Ontario Hydro to work on the project by way of the EPSCA office. Further, it is undisputed that Ontario Hydro applied certain provisions of the EPSCA collective agreements to the work at the B.E.C. For example, the employees worked 38 hours per week, as prescribed by the EPSCA collective agreements. They were also paid in accordance with the terms of those same agreements. However, a pre-job conference was not convened before work on the project commenced, as required by the EPSCA collective agreements. Instead, Mr. Homan relied upon the work assignments made on the previous phases of the steam pipeline, a practice which every witness agreed had occurred in the past on occasion.

45. During the course of the construction of the steam pipeline, questions arose regarding certain work being performed on the project. During the month of October, 1994, Mr. Homan and Mr. Morrison spoke regarding the fabrication of "sliders" for the piers upon which the pipeline would sit. Mr. Morrison had heard that these "sliders" would not be manufactured on the site but that their fabrication would be contracted out. Mr. Morrison desired that these "sliders" be manufactured on site in order to keep his union's members employed. Mr. Homan confirmed to Mr. Morrison the next day that Mr. Morrison's information was correct. The work was, in fact, contracted out. The U.A. did not file any grievance under the EPSCA collective agreement respecting that decision by Ontario Hydro.

46. Furthermore, during the month of October, 1994, a dispute arose between the U.A. and the Ironworkers regarding the transport of road crossings from the B.N.P.D. fabrication shops and their placement at the B.E.C. Both trades claimed this work. No formal request under the EPSCA collective agreement for a mark up meeting was made by either the Ironworkers or the U.A. The evidence establishes that Mr. Homan met with Mr. Morrison and Mr. Armstrong, from the Ironworkers, and suggested that a composite crew perform the work. Mr. Morrison resisted this resolution. Ultimately, after reviewing final drawings of the work, Mr. Homan assigned the work in part to the Ironworkers (the loading of the road crossing and assisting in the transport of the road crossing to the site) and in

part to the U.A. (the off-loading of the road crossing and the placement of it). Mr. Homan testified that this resolution was considered by Ontario Hydro as being “a good business decision”.

47. Mr. Morrison did not file a jurisdictional dispute with the Board in accordance with the EPSCA collective agreement, on the basis that the work was not performed pursuant to that agreement, and that, accordingly, there was no collective agreement under which to claim the work. It was Mr. Homan’s (admittedly self-serving) evidence that he felt that he was dealing with this dispute no differently than he would otherwise deal with it under the EPSCA collective agreements. However, as was demonstrated during Mr. Homan’s cross-examination, Mr. Homan did not come close to following the work assignment resolution mechanisms set out in the collective agreement that he stated he felt governed by.

48. Notwithstanding this, however, it is evident to us that Ontario Hydro was proceeding at the time under the assumption that the EPSCA collective agreements applied to the work on Phase Four of the steam pipeline. Mr. Homan did not strictly follow the work assignment or mark up procedures contained in the EPSCA collective agreement governing the U.A., but this was clearly the result of the extremely short time frame within which this work was to be completed. We are satisfied that Ontario Hydro was performing this work in accordance with the EPSCA collective agreements, and in particular with the Generations Projects provisions of the agreements. Just as confidently, we are certain that Mr. Morrison, on behalf of the U.A., was well aware of his union’s desire and intention to certify Ontario Hydro in the I.C.I. sector of the construction industry, and that he conducted himself in such a manner so as to minimize the suggestion that he was applying the EPSCA collective agreement to the work in question. There is, of course, nothing wrong with this.

49. The work on the steam pipeline progressed until November 17, 1994, the certification application date. On that date, the U.A. and the Labourers both applied to the Board to represent employees of their respective trades employed by Ontario Hydro in the province of Ontario in the I.C.I. sector of the construction industry, and in all other sectors of the construction industry in Board Area 3.

50. There was a significant amount of evidence focused on how and when this information came to the attention of Ontario Hydro. It would appear that early on the morning of November 17, 1994, the Chief Steward of the I.B.E.W., Local 1788, Mr. Bray, attended at Mr. Homan’s office at the B.N.P.D. and provided him with what Mr. Homan considered to be a somewhat puzzling message, something to the effect that “his union was not the problem”, and that “two other unions were involved”. When Mr. Homan tried to clarify Mr. Bray’s comments, he was told that the problem was “up the hill” and a reference was made to the I.C.I. sector of the construction industry. Mr. Bray thereupon left Mr. Homan’s office.

51. Mr. Homan, slightly mystified by all of this, spoke to Mr. Fitt later that morning regarding the conversation he had had with Mr. Bray. Mr. Fitt had attended at Mr. Homan’s office regarding an unknown “problem with the steam line work” at the B.E.C. Later that morning, two separate meetings were held involving some or all of Mr. Cushing, Mr. Jennings, Mr. David Thaw, the Divisional Superintendent at the B.N.P.D., Mr. Fitt and Mr. Homan, with the attendance over the telephone by Mr. Donnelly of Ontario Hydro labour relations, and legal counsel. It was ultimately determined by Mr. Cushing to halt the work at the B.E.C. until the full scope of the “problem” at the B.E.C. was identified. At the time, it appeared that there was some belief on the part of Ontario Hydro management that the I.B.E.W. was involved in the situation.

52. At approximately 12 noon, the Acting General Foreman at the B.E.C. site, Mr. Rodger Urbshott, was instructed by Mr. Thaw to stop all work on the site and to send the men working that day to other work. This direction was carried out by Mr. Urbshott and Mr. Fitt, who travelled to the site. Some work was authorized in the afternoon to secure the site while Ontario Hydro investigated the

nature of the “problem” at the B.E.C. As well, the work manufacturing the pipe for the B.E.C. at the pipe fabrication shop on the B.N.P.D. site continued, because the work was being performed at the B.N.P.D., and there was no question regarding the applicability of the EPSCA collective agreements to this work.

53. Ultimately, the work at the B.E.C. was completed in the summer of 1995. It was determined by Ontario Hydro during the previous winter to complete the work using an outside contractor. Drawings were prepared by Ontario Hydro indicating the stage to which the work had been completed to that date. The work was then contracted out by “the B.E.C.” to Campbell-Cox Inc., the successful bidder. Its three subcontractors utilized construction trades to carry out the work. In that regard, a mark-up meeting with respect to the project was held on May 31, 1995. The contractor indicated at this meeting that the work would be completed pursuant to the terms of the EPSCA collective agreements for Generations Projects. It was the position of the U.A. and the Labourers at this meeting that this work was not properly performed under the EPSCA collective agreements and that it was work in the I.C.I. sector of the construction industry.

54. There was a great deal of evidence directed towards identifying both the nature and the location of the work being performed by the construction trades at the B.E.C. on the certification application date. The evidence before the Board, consisting of Mr. Fitt’s notes and recollections of the work being performed on that date, Mr. Morrison’s observations while in attendance at the B.E.C. site that morning, the description of the work that was completed on that date, the photographs of the site, and a sketch that was provided by Mr. Morrison of the work in relation to the road allowance, establishes that the work which was performed on November 17, 1994 by members of the U.A. was the placement of a road crossing and the cleaning of the anchor bolts on the concrete piers and the placement of the pipe support base plates (i.e. the “sliders”) on the piers which had been previously constructed. Likewise, the two members of the Labourers were assisting in the excavation of the ditch where the road crossing was to be placed, and cleaning the foundations prior to the pouring of the piers. In our view, the evidence establishes that work was performed on both the municipal road allowance and Lot 2 by members of both the U.A. and the Labourers.

(d) Other Construction of Significance

55. During the course of the evidence the Board heard testimony and received exhibit material regarding various other construction work relating to services made available by Ontario Hydro (at reasonable cost recovery) to those businesses which operate in the B.E.C. It is clear from the evidence before the Board that electrical service, sewer and water services (both potable water and water for industrial purposes), a sewage treatment plant, a sewage lagoon and (previously) a temporary fire protection lagoon have been established by Ontario Hydro to support those businesses located at the B.E.C.. For the most part, Ontario Hydro owns the infrastructure involved in providing these services. The Board entertained at times extremely detailed evidence respecting each of these projects.

56. We do not propose to outline the evidence regarding these site services in any great detail. In our view it is unnecessary to do so. As noted above, Mr. Morrison testified, and we accept his testimony, that Ontario Hydro represented throughout his tenure as the U.A. Chief Steward that the two mile administrative boundary had particular significance to the application of the EPSCA collective agreements at the B.N.P.D.. Mr. Thaw, in his testimony, agreed that, in his experience, the geographic scope of the EPSCA collective agreements ended at the Delivery Gate on the power corridor. The evidence adduced respecting other construction work relating to the B.E.C. establishes quite convincingly that the consistent view of Ontario Hydro management, as expressed to Mr. Morrison and other Chief Stewards of the construction trades, was that the EPSCA collective agreements had, as their geographic limit at the B.N.P.D., the two mile administrative boundary.

57. To cite one example briefly, the sewer and watermain construction relating to the B.E.C. was split into nine separate contracts. The contracts were grouped in accordance with whether the construction was within the two mile administrative boundary, or outside of that same boundary. The contracts relating to the infrastructure within the two mile boundary were let by Ontario Hydro in accordance with the Labour Requirements clauses contained in the EPSCA collective agreements. On the other hand, those contracts relating to work outside of the two mile administrative boundary were let by Ontario Hydro without reference to the terms of the EPSCA collective agreements. It is noteworthy that Ontario Hydro owns all of the piping infrastructure located in or about the B.E.C. associated with the sewer and water services.

58. The one exception to this uniform approach by Ontario Hydro would appear to be a paving contract for the 4th Concession Road which runs due east from the B.N.P.D. site. It appears that this contract was let by Ontario Hydro and performed with EPSCA trades, and pursuant to the EPSCA collective agreements, notwithstanding that the road proceeds beyond the two mile administrative boundary. However, the one memorandum placed into evidence which speaks to this contract (Ex. 43) suggests that Ontario Hydro was concerned that the letting of the contract in accordance with the EPSCA collective agreements would “void” its claim that the two mile administrative boundary was the appropriate demarcation point for the application of the EPSCA collective agreements. It was suggested in testimony that there were other “anomalies” of this nature, but no other work was the subject of evidence.

59. As noted above, we are satisfied that the two mile administrative boundary has been and is, in the view of Ontario Hydro, the geographical demarcation point respecting the application of the EPSCA collective agreements at the B.N.P.D. As a practical matter, almost all of the construction work completed in or about the B.N.P.D. and the B.E.C. has been performed in accordance with that principle. We are also satisfied, on the basis of Mr. Morrison’s testimony, that Ontario Hydro communicated this view to the Chief Stewards of the construction trades on numerous occasions.

(e) Property Rights In and About the B.E.C.

60. Consistent with the other aspects of these proceedings, the Board heard detailed evidence relating to the property and other rights held by Ontario Hydro in and about the B.E.C.. In particular, the Board heard the evidence of Mr. Robert Waram, the Clerk-Treasurer of Bruce Township, and Mr. Pat Grace, the “Program Manager, Acquisitions and Appraisal, Grid System Real Estate” of Ontario Hydro. In that role, Mr. Grace is responsible for obtaining and maintaining the property rights Ontario Hydro requires for its construction forces to perform the work required. During the course of the evidence the Board was also provided with, and marked as exhibits on consent of the parties, numerous registered plans of subdivision, surveys, licence agreements and other documents which identify the various rights held or enjoyed by persons on or about the B.E.C. site.

61. It was the evidence of Mr. Grace that Ontario Hydro obtains various different types of rights in or about property in order to perform its work. In some circumstances, Ontario Hydro purchases land in fee simple - an example being the purchase of land to build a transmission station. However, in many situations rights of a lesser nature are acquired by Ontario Hydro, including easements, land use permits, licences, and leases.

62. With respect to the acquisition of easements, Mr. Grace stated that the easements held by Ontario Hydro take various forms. Some are specific, project-related easements, whereas others are in perpetuity or for long, fixed terms. A majority of the easements are registered on title against the land subject to the easement, but some are not. In this regard, the cost of registration (most significantly the cost of a survey) typically precludes the routine registration of all of Ontario Hydro’s easements. However, the easements are capable of future registration if desirable.

63. It was also noted by Mr. Grace that Ontario Hydro often acquired its property rights after performing the work in question. However, most property rights in favour of Ontario Hydro are in place before its construction forces go onto the property in question. Mr. Grace noted that the licence agreements obtained by Ontario Hydro are not registered on title to the subject property.

64. Moving to the B.E.C. itself, the evidence establishes that Ontario Hydro does not have title in fee simple of any real property on the B.E.C. site, with the exception of a small parcel of land in Lot 18 upon which a water tower is located. Ontario Hydro owns and operates the water tower.

65. Ontario Hydro does have certain rights in property at the B.E.C. as the holder of registered easements in its favour granted by Boiler Beach in November, 1986. These easements are directly related to Phase Two of the steam pipeline, and do not affect or burden the land which is in question before us. Although there have been discussions between Ontario Hydro and Bruce Township for many years respecting the need for easements to be provided to Ontario Hydro to recognize the utilization of Bruce Township land within the B.E.C. (i.e. the road allowance known in part as Farrell Drive) by Ontario Hydro for sewer lines, water lines, and the steam line, no easement documentation has ever been prepared by Ontario Hydro or Bruce Township. In fact, the evidence suggests that for some considerable period of time the question of the need for such documentation has been a live (though not always a pressing) issue between Bruce Township and Ontario Hydro. In any event, it appears from the evidence that the first step towards such agreements - a comprehensive survey of the sewer, water and steam infrastructure under the road allowance at the B.E.C. site - has been authorized by Bruce Township and completed by Ontario Hydro. But no easement documentation of any sort in favour of Ontario Hydro has been prepared by Ontario Hydro or Bruce Township and accordingly there is no documentation between Ontario Hydro and Bruce Township reflecting any easement on the B.E.C. site.

66. That this is, in fact, the case was highlighted quite vividly by a resolution of Bruce Township Council dated December 20, 1994, approximately one month after the certification applications were filed with the Board. On that date, Bruce Township Council passed a resolution in which it is noted that Ontario Hydro had built Phase Four of the steam line across portions of Lots Two, Three and Four of the B.E.C., and at least partially on the Bruce Township road allowance (which is discussed in more detail below). The Township Council agreed to give "temporary approval" to complete the project with the understanding that Ontario Hydro was to provide to the Township, within 60 days of the project's completion, a registered easement agreement. Also to be provided to Bruce Township were "as built" drawings. No such easement documentation or drawings had been provided to Bruce Township as at the dates of the hearing.

67. Ontario Hydro has, since 1985, negotiated two limited licence agreements with Bruce Township. These documents, which are dated October 7, 1985, and August 20, 1987, and are specifically characterized as licence agreements, provide Ontario Hydro with the right to enter on certain property owned by Bruce Township to place road crossings under the land. The first such document allowed Ontario Hydro to place a road crossing under the Bruce Tie Road to accommodate a sewer line. The second document allowed placement of a road crossing in the B.E.C. under an approximate 50 metre by 35 metre portion of Farrell Drive for the installation of Phase Two of the steam pipeline.

68. Furthermore, there are other documents which establish that Ontario Hydro has obtained from the property owners in the B.E.C. a right to construct things - like steam pipelines - over their property. Introduced into evidence were numerous Steam Sale Agreements for heat energy which were executed in June, 1994. These agreements govern the terms and conditions of the delivery of heat energy to the businesses currently located at the B.E.C.. Also entered into evidence were Development Agreements for Heat Energy, again dated in June, 1994, in which property owners in the B.E.C. have agreed with Ontario Hydro regarding the terms and conditions of the potential delivery of heat energy

to any business located on site. It was the evidence of Mr. Chuck Edey, the Liason Officer for the B.E.C. representing Ontario Hydro Nuclear, and the Ontario Hydro employee responsible for the B.E.C., that these agreements covered each business and property owner at the B.E.C..

69. Although each of the Steam Sale Agreements is tailored to the needs of the individual business located at the B.E.C., each is, to a great extent, based upon a similar boilerplate document. Each of the Steam Sale Agreements (including one binding Ontario Hydro and Bi-Ax) contains the following clause:

- 9.3 The Customer hereby grants to Hydro the right at all times during the continuance of this Agreement to use, free of charge or rent, as much of the Customer's lands as Hydro may deem necessary for the supply of Steam to the Customer and other customer [sic] in the BEC, and to accept returned Condensate from the Customer and other customers in the BEC. The location of the lands required for such purpose is to be mutually satisfactory to Hydro and the Customer.

70. The Development Agreement for Heat Energy between Ontario Hydro and Bruce Energy Centre Limited (now Ontario Interlink Industrial Park Limited), does not contain such a clause as that set out above. However, it indicates that heat energy is to be made available to any customer locating at the B.E.C. on a first come, first served basis, and will be provided in accordance with "the steam supply agreement in the form of attachment "A" hereto". Attached to the Development Agreement as attachment "A" is a draft Steam Sale Agreement of the nature of those described above, with a clause 9.3 similar to that outlined directly above, except that it has the following words added at the end of the clause:

"... and will be subject to appropriate easements."

A Development Agreement for Water and Sewer services between the same two parties has a similar structure, with a similar clause in the draft "Agreement for Water and Sewer" attached to the Development Agreement. However, Mr. Edey noted in his testimony that these agreements were negotiated and signed by Ontario Hydro and Bruce Energy Centre Limited in order to allow the latter entity to develop the property more easily, and that when an industry located at the B.E.C. a separate contract based upon the draft would be negotiated between Ontario Hydro and the customer. Accordingly, it is evident that neither of the Development Agreements signed by Bruce Energy Centre Limited actually provide rights to Ontario Hydro to access Bruce Energy Centre Limited real property on the B.E.C.. We note here for completeness that the Development Agreements both contain the usual provision found in agreements of this nature that they are to extend to, and bind, the successors and assigns of the parties.

71. In that regard, there would appear to be no dispute that, as at November 17, 1994, the certification application date, Lot 2 of Plan of Subdivision 3R-3851, being the vacant land between the Bi-Ax plant and St. Lawrence Technologies Inc., was owned by Ontario Interlink Industrial Park Limited. As noted, Lot 1, where the Bi-Ax plant is located, is owned by Bi-Ax International Inc., which is subject to a Steam Sale Agreement containing clause 9.3 identified above.

72. There was substantial testimony called before the Board dealing with the question of the road allowance. It is evident from Plan of Subdivision 3M-113 that the real property which constitutes Farrell Drive was dedicated by Boiler Beach to Bruce Township as a public highway on May 15, 1986, when the Plan of Subdivision was registered with the land registry office for the County of Bruce. On May 10, 1994, Bruce Township Council purported to assume Farrell Drive by way of By-Law 94-12. However, it would appear that By-Law 94-12 was erroneously drafted in such a manner as to be incapable of registration; accordingly, By-Law 94-12 was repealed, and Farrell Drive was properly assumed by the Township by way of By-Law 95-11, dated February 28, 1995. There is no dispute that the road allowance dedicated by Boiler Beach to Bruce Township is 35 metres wide. Mr. Waram, the

Clerk-Treasurer of Bruce Township, identified Farrell Drive as the only real property owned by Bruce Township at the B.E.C.

73. Mr. Morrison testified that he and Mr. Casemore had attended at the site and measured 17.5 metres from the centre of Farrell Drive towards Lots 1 and 2, where the construction work on the steam line was being performed on November 17, 1994. It was Mr. Morrison's testimony that the road crossing installed on that date appeared to him to be well within the 17.5 metre road allowance, and that the work on the steamline performed on that date appeared to be well beyond the 17.5 metre road allowance. However, as was brought out in cross-examination, there was no evidence that Farrell Drive itself was paved on the middle of the 35 metre road allowance, and accordingly the drawing which was prepared by Mr. Morrison could well be inaccurate. Ultimately, we do not believe that the determination of the issues before us are influenced by whether Bruce Township or a private owner had title to the real property where the work was performed on the certification application date.

IV. Argument and Reasons for Decision

74. The argument of counsel was lengthy and complicated. Rather than setting out the argument of counsel separately, we feel it to be more effective to integrate the relevant argument with the reasons for our decision, and therefore we do so, directly below.

75. As noted above, the parties focused their arguments on two specific aspects of the recognition provisions of the relevant EPSCA collective agreements; namely whether this work was performed "on Ontario Hydro property", and, if so, whether this work could be described as being "for the bulk power system". Having regard to our conclusion respecting the issue of "on Ontario Hydro property", it is unnecessary to address the issue of the scope or meaning of the words "for the bulk power system". We note here that an estoppel argument raised by Ontario Hydro in its pleadings was not pursued in argument.

76. As his primary argument, counsel for Ontario Hydro submitted that this issue was not as complicated as opposing counsel were suggesting it was, because there is no dispute that Ontario Hydro owns the infrastructure of all four phases of the steam pipeline, including that phase being completed on November 17, 1994. Accordingly, it was submitted that, giving the word "property" its normal and ordinary meaning, it would encompass both real and personal property, including the steam pipeline itself. The plain and literal meaning of "property" is not limited to real property or land, but extends to "that which belongs to one", which, in this case, includes the steam pipeline itself. If such an interpretation were given to the collective agreements, the only conclusion that the Board could reach would be that the work in question was being performed "on Ontario Hydro property" on the certification application date.

77. In support of this interpretation of the collective agreements, counsel referred the Board to numerous sections of the *Power Corporation Act*, noting that "land" is a defined term in that legislation. It was noted that the word "land" was not defined in the legislation by reference to the word "property", but rather "real property", and that the concept of "property" as encompassing personal property is reflected by certain provisions of the legislation respecting expropriation.

78. Counsel submitted further that the only distinction between Phases One and Four of the steam pipeline is that, on Phase One, when the EPSCA trades built the steam pipeline, they stood on real property belonging to Ontario Hydro. It was noted that Mr. Jim MacKinnon, the Business Manager of the Labourers, testified that he had never before searched a title to see who had owned land before claiming work for his union pursuant to the EPSCA agreement, or before performing such work once awarded to the Labourers. It was asserted that Mr. MacKinnon had, through his conduct, acknowledged that Ontario Hydro did not own all of the land which has supported work awarded to the Labourers

under its EPSCA collective agreement, and that this was indicative of how the Labourers had historically interpreted the words “on Ontario Hydro property”.

79. We have considered this argument quite carefully. We are of the view that this interpretation of the collective agreement is incapable of being supported, given the totality of the evidence before us.

80. We start with the observation that counsel for Ontario Hydro quite accurately notes that “property”, in its plain and literal meaning, can refer to both real and personal property. Given the undisputed testimony that Ontario Hydro owns the infrastructure of the steam pipeline itself, up to and including the terminal isolating valves, it is not an unreasonable argument to assert that the words “on Ontario Hydro property” includes work on personal property owned by Ontario Hydro. The difficulty, however, in interpreting the language in this manner is in squaring it with the interpretation historically adopted by Ontario Hydro itself.

81. As noted above, the documentary evidence undeniably establishes that Ontario Hydro management was of the view that, for the purposes of the B.N.P.D., the geographic limit of the EPSCA collective agreements was that point on the power corridor which coincided with the two mile administrative boundary (or the “delivery gate”, as it is now known). Mr. Morrison testified that members of Ontario Hydro management, and in particular Mr. Arnulf Bellstedt, the General Superintendent with Ontario Hydro Construction at the B.N.P.D., had represented to him repeatedly that the EPSCA collective agreements have no application beyond the two-mile administrative boundary. The evidence is just overwhelming in that regard. No evidence to the contrary was offered by Ontario Hydro.

82. Keeping all of that in mind, it becomes quite obvious why the second and third phases of the steam pipeline were constructed by Resolute and Butler, respectively, without the use of EPSCA trades. Until the U.A. successfully obtained an I.C.I. certificate from the Board respecting Resolute, the work on Phase Two of the steam pipeline was performed on a non-union basis, without reference to the applicable EPSCA collective agreements. If one adopts the theory of Mr. Bellstedt, and other Ontario Hydro managers, the work on the second and third phases of the steam pipeline was performed in accordance with the terms of the EPSCA agreements, inasmuch as the EPSCA agreements would be inapplicable to the work at the B.E.C., that work being not “on Ontario Hydro property”.

83. Similarly, it is difficult, if one adopts the “plain and literal” approach submitted by counsel for the employer, to explain why Ontario Hydro did not perform the work on Phases Two and Three of the steam pipeline with EPSCA trades, and pursuant to the EPSCA collective agreements. A similar observation applies to the sewer and watermain work performed on the B.E.C. site. The sewer and watermain infrastructure is owned by Ontario Hydro. Applying counsel’s “literal interpretation” approach, there is no apparent way to justify the utilization of non-union contractors to perform Phases Two and Three of the steam pipeline, given that the actual pipeline worked on was always “Ontario Hydro property”. It is significant, in our view, that none of the EPSCA trades involved in the installation of Phase One of the steam pipeline grieved the completion of Phases Two and Three of the steam pipeline pursuant to the EPSCA collective agreements. The EPSCA trades obviously believed, as did Ontario Hydro management at B.N.P.D., that the EPSCA collective agreements did not apply to that work. The U.A. certainly did, because it organized the steamfitters and pipefitters employed by Resolute on Phase Two of the steamline and obtained an I.C.I. certificate from the Board in September, 1986.

84. The distinction drawn in the *Power Corporation Act* between “land”, on the one hand, and “property”, on the other, is, in our view, largely unhelpful. There is no doubt that such a distinction can be made; as we note above, outside of the context of the particular relationship between these parties, there is a legitimate distinction to be made between “land” and “property”. However, there is absolutely no evidence before us to suggest that the parties, in negotiating the EPSCA collective agreements, made

reference to or considered themselves bound to adopt the language contained in the *Power Corporation Act*. Without evidence of that nature, it is entirely irrelevant how the *Power Corporation Act* defines or deals with the concepts of “land” or “property”. There is simply no reason for us to believe that the parties had any cause to consider the definitions or concepts of “land” and “property” in the *Power Corporation Act* when they negotiated the relevant provisions of the EPSCA collective agreements. In the absence of evidence of that nature, we can find little reason to interpret the collective agreements in accordance with that legislation.

85. On the evidence before us, we are satisfied that Ontario Hydro management at the B.N.P.D. and the various trades bound by the EPSCA collective agreements in question had a mutual belief that “on Ontario Hydro property” meant that the work in question was to be performed on real property upon which Ontario Hydro had some right or interest. This mutual belief incorporated a long-standing practice of Ontario Hydro, which was acceptable to the construction trades, and is more than an estoppel applicable against Ontario Hydro.

86. As an alternative argument, in the event that the Board were to determine that “on Ontario Hydro property” related in some manner to real property, as opposed to personal property, counsel for Ontario Hydro addressed the question of the scope of the term “property”. Counsel submitted that the concept should be broadly interpreted, to include, at minimum, all real property rights that Ontario Hydro would have the authority to exercise under the *Power Corporation Act*. In counsel’s submission, this would encompass any rights acquired by Ontario Hydro to use land. That is, it is argued that if Ontario Hydro were entitled to use another’s land, then work on that real property could be said to be work “on Ontario Hydro property” for the purpose of the EPSCA collective agreements.

87. Counsel referred the Board to excerpts from the *Power Corporation Act*, which are set out below:

48(1). In this section, “right” means any right, interest, way, privilege, permit or easement.

(2) Despite any other Act, where any right has been or is hereafter acquired by the Corporation, in, through, over, under, along, upon, across or affecting any land, unless it is otherwise agreed, the land continues subject to the right for the term thereof and it is binding upon the owner at the time of acquisition and all subsequent owners of the land until expiration or release by the Corporation.

(4) The Corporation, a municipal corporation or a commission mentioned in subsection (3), upon the request of a person intending to acquire an estate or interest in any land, shall make a search of its records and inform the person as to whether or not it has a right that relates to the land that it not registered under the *Land Titles Act* or the *Registry Act*.

49. Despite this Act or any other general or special Act, where works of the Corporation have been affixed to realty they remain subject to the rights of the Corporation as fully as they were before being so affixed and do not become part of the realty unless otherwise agreed by the Corporation in writing.

88. Counsel for Ontario Hydro reviewed with the Board the language utilized in the above-referenced statute. He noted that the language, which speaks of “rights”, does not speak to the purpose for which the right was acquired, nor does it speak to any restriction regarding how the right was acquired. Counsel submitted that, where Ontario Hydro has acquired the right to build a steam pipeline on municipal lands or lands owned by Ontario Interlink, that right is a “right” for the purpose of section 48 of the *Power Corporation Act*. Pointing to section 48(4) of the *Power Corporation Act*, counsel notes that the provision reflects an expectation that Ontario Hydro may maintain a right held pursuant to that section of the legislation where it is not registered. In other words, even non-registered “rights” are effective when held by Ontario Hydro.

89. With regard to the question of whether it is necessary to register these “rights” to make them relevant for the purpose of interpreting the concept of “Ontario Hydro property”, counsel submitted that the answer to that question was clearly in the negative. Counsel observed that registration is not itself the creation of rights but rather the public identification of those rights. Any right agreed to between two parties is enforceable as between those parties whether the right is registered or not; however, as between one of those parties and a *bona fide* purchaser of the land for value without notice of the right, there may be a question as to the effectiveness of the right absent registration, or a legislative provision such as section 48(2) of the *Power Corporation Act*.

90. Applying these concepts to the case at hand, counsel submitted that the fourth phase of the steam pipeline was built with the right to do so (be it described as a “right”, “way”, “privilege” or “permit”) from all of the relevant landowners. Counsel noted that Bruce Township had given its permission to Ontario Hydro to work on the road allowance, whether or not there was any registered easement on title. It was observed that section 48(2) of the *Power Corporation Act* did not require that the “right” provided to Ontario Hydro be contained in a document.

91. With respect to the work performed on Lots 1, 2, and 3 at the B.E.C., counsel pointed to the Steam Sale Agreements, and the Development Agreement executed in June, 1994, which contained Article 9.3 (or its equivalent), set out above in paragraph 69. These agreements are documentary approvals allowing Ontario Hydro the right to have its property - the steam line - on the private landowner’s property. These “rights” are not fully documented or registered, but, submits counsel, in light of section 48(2) of the *Power Corporation Act*, they do not have to be. The failure to register does not diminish the right granted to Ontario Hydro by those property owners.

92. Counsel for the U.A. disagreed fundamentally with the position taken by Ontario Hydro counsel. It is the position of the U.A. that “Ontario Hydro property” in the EPSCA collective agreements requires Ontario Hydro to have a registerable interest in the property upon which the work is performed. In furtherance of that theory, counsel reviewed a number of real property concepts and definitions. Particularly relevant was the distinction between the concept of a “licence” and an “easement”; the former does not create an interest in the land to which it refers, and the latter, which creates a right over land without exclusive use or possession of it, does. It was submitted that Ontario Hydro failed to appreciate the distinction between these two concepts, and that the Steam Sale Agreements simply granted Ontario Hydro a licence to build and maintain a steam pipeline, rather than an easement or a registerable property right. Similarly, counsel for the U.A. described the approval from the Township of Bruce as “the right to trespass” - which is itself nothing more than a licence. Licences pass no proprietary interest in the land, grants a privilege only, and cannot be registered on title.

93. With respect to this approval, counsel reviewed sections 261 and 262 of the *Municipal Act*, R.S.O. 1990, c. M. 45, as amended, which speak to the issue of what constitutes a public highway. Section 261 provides that all roads dedicated by the owner of land to public use are common and public highways. However, case authorities provided by counsel (in particular, *Gregory v. Edwards and Corporation of Village of Hastings* [1962] O.R. 993, and *Onyschuk v. Silver Harbour Acres Ltd.*, (1984), 49 O.R. (2d) 762) were said to stand for the proposition that to establish a “dedication” of land, two different acts must themselves be established; first, that the property owner intended to dedicate the land as a public highway, and second, that the relevant municipal authority has accepted the dedicated property as a highway.

94. Applied to the facts of our case, counsel submitted that there had been no assumption by Bruce Township of Farrell Drive as a public highway as at the certification application date, inasmuch as the documentation relating to the assumption of the road had not yet been executed or registered in the appropriate registry office.

95. Counsel for the U.A. also brought the Board's attention to section 1(1) of the *Statute of Frauds*, R.S.O. 1990, c. S. 19, which reads as follows:

Every estate or interest of freehold and every uncertain interest of, in, to or out of any messuages, lands, tenements or hereditaments shall be made or created by a writing signed by the parties ... and, if not so made or created, has the force and effect of an estate at will only, and shall not be deemed or taken to have any other or greater force or effect.

Here, submitted counsel, no such written record of any easement had been created, and accordingly the effect is the creation of an estate at will; effectively, a licence.

96. Counsel for the Labourers elaborated a slightly different view of the law than did other counsel. Counsel relied upon the analysis of counsel for the U.A., but asserted that "on Ontario Hydro property" in the recognition clause of the Labourers' EPSCA collective agreement refers to "a land law theory rooted in the soil", and does not include other rights or forms of rights in relation to property. Put more succinctly, counsel for the Labourers stated that the language refers to "land owned by Ontario Hydro in fee simple".

97. As noted much earlier, the recognition clause of the EPSCA collective agreement binding the Labourers contains language which arguably speaks to the issue of the content of the words "on Ontario Hydro property"; in particular, article 1.2 which reads as follows:

1.2 The work described in Section 1.1 shall also include work on property acquired by Ontario Hydro for:

(a) the supply of aggregate and concrete used in the construction of said facilities; and

(b) ancillary material yards which are defined as property acquired by Ontario Hydro for the storage of materials to be used on a project by Employers.

It is argued that article 1.1, when read in context with article 1.2 must be read to refer to real property.

98. We have carefully considered all of the arguments of counsel. We do not believe that it is necessary to identify exactly what interest or interests in real property must be held by Ontario Hydro in order to establish that work is done "on Ontario Hydro property" for the purpose of either EPSCA agreement before us. Assuming, without deciding, that it is possible to establish that work was performed "on Ontario Hydro property" by establishing that the work in question was performed on real property in which Ontario Hydro has acquired a lesser interest in (or right of access to) the property than ownership in fee simple, it is evident to us that, in the circumstances before us, no such lesser interest in or right of access to land had been, at the time of the certification application date (or, on the evidence, even after that date) acquired by or provided to Ontario Hydro, registerable or otherwise.

99. As noted above, we are satisfied that on the certification application date, work was performed by members of the two applicants on both a road crossing on the B.E.C., and on the piers and foundations for the steam pipeline on Lot 2 at the B.E.C. The road crossing was installed on the municipal road allowance, and Lot 2 was owned at the time by Ontario Interlink. These are the relevant pieces of real property to which we must direct our attention.

100. With respect to the road crossing, it is evident that Bruce Township had not properly registered a by-law with the local registry office assuming the municipal road allowance as at November 17, 1994. However, we question whether as a matter of law it was necessary to do so, for the purposes of this proceeding. It is clear that Boiler Beach had dedicated the entire road allowance to Bruce Township on May 15, 1986 by way of the dedication contained in the owner's certificate on Plan of

Subdivision 3M-113 registered by Boiler Beach with the Township on that same date. Section 261 of the *Municipal Act*, R.S.O. 1990, c. M.45, as amended, reads as follows:

Except in so far as they have been stopped up according to law, ... all roads dedicated by the owner of land to public use ... are common and public highways.

It appears from this provision of the *Municipal Act* that, as at May 15, 1986, Farrell Drive and the road allowance dedicated to Bruce Township by Boiler Beach was a “common and public highway” which, in accordance with section 262 of the *Municipal Act*, was “vested” in Bruce Township. As observed by the Court in *Gregory v. Edwards and Corporation of the Village of Hastings*, cited above, the consent by Bruce Township to the registration of the registered Plan of Subdivision 3M-113 with the dedication of Farrell Drive contained therein is acceptance by Bruce Township of the highway shown on the plan.

101. In this regard, we disagree with the summary of the law regarding the “dedication” of land submitted by counsel for the U.A.. In *Gregory v. Edwards and Corporation of the Village of Hastings*, cited above, the Court noted, at pages 1002 and 1003, that the land in question did not come within the language of what is now section 261 of the *Municipal Act* because there had previously been no dedication of the property by any owner of property at any time. This is a different situation. There has been, since May 15, 1986, an obvious dedication of real property to Bruce Township by Boiler Beach, the owner of land.

102. Accordingly, we conclude that the road allowance at the B.E.C. was, at all relevant times, vested in Bruce Township. However, even if we are wrong, the end result is the same, for the purposes of these proceedings. Whether Bruce Township owned the road allowance on November 17, 1994, or Boiler Beach continued to own the property constituting the road allowance on that date, neither Bruce Township nor Boiler Beach had provided Ontario Hydro with any property right or right of access to its property to build a steam line (or, for that matter, to build *anything*) on the road allowance as at that date. The absolute best case scenario that can be established by Ontario Hydro is that, as at the certification application date, Bruce Township was aware of the construction of Phase Four of the steam pipeline and did not preclude Ontario Hydro from doing necessary construction work on the road allowance. There is absolutely no evidence at all before us that Boiler Beach had any knowledge of the work being performed on Phase Four of the steam pipeline.

103. A similar situation applies with respect to the owner of Lot 2, Ontario Interlink. We have discussed, above, the Development Agreements between Ontario Hydro and Ontario Interlink (or its predecessor, Bruce Energy Centre Limited), and the clauses contained in the respective agreements regarding access to property. There is absolutely nothing in either of those agreements which establishes that Ontario Interlink, at any time, provided Ontario Hydro with any property right or right of access to its property - specifically Lot 2 - to build a steam pipeline. Furthermore, there is no evidence before us to suggest that Ontario Interlink was aware of the construction of the steam line across its property at Lot 2 of the B.E.C.. However, assuming that Ontario Interlink was aware of the construction of the steam line, it is in the same position as Bruce Township - that is, it merely did not preclude Ontario Hydro from doing the construction work on Phase Four of the steam pipeline on its property.

104. But how far does this take Ontario Hydro, for the purposes of this proceeding? Section 48 of the *Power Corporation Act*, set out above in paragraph 87, does not advance its case at all, because what that provision does is provide that, once in possession of a “right” (as defined in that section), the land continues subject to that right for as long as the right is agreed to continue, and the right binds subsequent owners of the real property. It does *not* provide that the land is “Ontario Hydro property” for the purpose of the EPSCA collective agreements. All that the legislation really states is that certain concepts (rights, interests, ways, privileges, permits or easements) are “rights” for the purposes of the *Power Corporation Act*.

105. On the evidence before us, the very best that Ontario Hydro could establish is that it had implied permission to use Bruce Township real property - the road allowance - and the real property owned by Ontario Interlink - Lot 2 - for the purpose of installing Phase Four of the steam pipeline. In our view, something more is required than an implicit permission to utilize real property in order to constitute that real property as "Ontario Hydro's" for the purposes of the EPSCA collective agreements. In our view, the work in question could not, therefore, have occurred "on Ontario Hydro property" for the purposes of the EPSCA collective agreements.

V. Disposition

106. We are of the view that the employees who form the basis of the bargaining units sought by each of the applicants were not represented by either of the applicants under its respective EPSCA agreement on the certification application date. Accordingly, the applications are not barred from proceeding for that reason.

107. The parties are directed to contact the Registrar's office in order to set further dates to consider the remaining issues in dispute including, if necessary, the identity of the applicant in Board File 2947-94-R.

108. We are seized of these proceedings.

2399-96-G Ontario Allied Construction Trades Council and Labourers' International Union of North America, Local 506, Applicant v. Ontario Hydro and The Electrical Power Systems Construction Association, Responding Parties

Charter of Rights and Freedoms - Constitutional Law - Construction Industry - Construction Industry Grievance - Discharge - Evidence - Practice and Procedure - Construction labourer discharged by Ontario Hydro for possessing and smoking marijuana at work and grieving that discharge was without just cause - Union seeking to exclude certain evidence on Charter grounds - Board finding evidence to establish just cause apart from evidence sought to be excluded - Board, therefore, not making any decision on union's Charter arguments - Union claiming that grievor's drug use was rooted in drug dependency that should be treated as a disease or disability requiring accommodation, rather than discipline - Board not satisfied that evidence establishing that grievor addicted or that he had come to grips with his situation - Grievance dismissed

BEFORE: *R. O. MacDowell*, Chair.

APPEARANCES: *John Moszynski* and *Bob Maskey* for the applicant; *M. Patrick Moran*, *Barry Roberts* and *John Douglas* for the responding parties.

DECISION OF THE BOARD; August 8, 1997

INTRODUCTION: WHAT THIS CASE IS ABOUT - IN BRIEF

1. This is an arbitration proceeding under section 133 of the *Labour Relations Act*, which arises from the grievance of employee "N" ("the grievor"). "N" contends that, on October 2, 1996, he was discharged by Ontario Hydro without just cause.

2. At the time of his discharge, "N" had been working as a labourer at the Pickering Nuclear Generating Station, for about 2½ years. During that 2½ years, there was no complaint about the quality of the grievor's work.
3. Hydro asserts that on October 2, 1996, the grievor was found in possession of marijuana; and that, in addition, the evidence before the Board establishes that the grievor has smoked marijuana on a number of occasions while at work. In Hydro's submission, this behaviour provides "just cause" for the grievor's discharge.
4. Hydro submits that a nuclear facility is an extremely sensitive work environment, where it is appropriate to enforce a policy of "zero tolerance": that is, employees found in possession of drugs or alcohol should be subject to immediate discharge. Consumption of alcohol or drugs is an even more dangerous dereliction of duty. Hydro asserts that strict enforcement of these rules is essential in order to ensure the safety of employees and the general public.
5. Hydro points out that safety is a critical concern in this industry, which is closely scrutinized by the Atomic Energy Control Board and the public. At this kind of workplace, drugs or alcohol would not only raise a safety hazard, but would also prejudice the image and viability of the business. Safety and commercial interests are intertwined; moreover, at the time of the grievor's discharge, the facility was undergoing a licencing review in which questions had been raised about the adequacy of the company's efforts to control drug and alcohol use on its premises. The grievor's misconduct occurred at an especially sensitive time.
6. The union replies that Hydro discovered the marijuana in the grievor's possession and secured some damaging admissions from him, in a manner that violated the grievor's rights under the *Canadian Charter of Rights and Freedoms*. The union asserts that, because of this "Charter breach", none of this evidence can be relied upon to support the grievor's discharge. In the union's submission, the fact that the grievor did in fact smoke marijuana at work is irrelevant in the face of the violation of the grievor's Charter rights. The union asserts that the grievor should be reinstated to his former job with full compensation for any wages lost.
7. In the alternative, the union asserts that the grievor's actual drug use *at work* (i.e. as opposed to drug use on his own time), was confined to a relatively short period of time (a few weeks) when he was experiencing personal problems at home. In the union's submission, this situation should be regarded as an isolated period in an otherwise unblemished work history. Whatever the grievor may have been doing on his own time, his behaviour on the job has generally been satisfactory.
8. The union further asserts that the grievor's drug use was rooted in a "drug dependency" that should be treated as a "*disease*" or "*disability*" that requires *accommodation*, rather than as a basis for discipline or discharge. According to the union, the grievor has successfully come to grips with his disability since the date of his discharge, so that there is now no risk associated with reinstating him to his former job.
9. In the union's submission, the situation either does not call for a disciplinary response at all, or calls for a lesser penalty than discharge. The union urges the Board to reinstate the grievor in his former position - perhaps with conditions requiring the grievor to pursue treatment for drug dependency, if the Board concludes that such condition caused or contributed to the events giving rise to his discharge.

CREDIBILITY

10. The hearing in this matter consumed several days, during which the Board heard from a number of employer witnesses, as well as from the grievor himself. Much of the background was not

in dispute. However, the grievor and the employer witnesses had somewhat different recollections of what was said and done on October 2, 1996, when the grievor was found with marijuana in his possession; so it is necessary to choose between these competing versions of events. The witnesses' credibility is squarely in issue.

11. In choosing what version to accept (in whole or in part) I have taken into account such factors as: the demeanour of the witnesses when giving their evidence; the clarity, consistency, and overall plausibility of that testimony when subjected to the test of cross-examination; the ability of the various witnesses to resist the tug of self-interest or self-justification when framing their answers or confronted with "troublesome facts"; and what seems most probable in all the circumstances. I have also taken into account the fact that the employer witnesses were excluded from the hearing room before giving their evidence, while the grievor was in the hearing room throughout the entire proceeding; moreover, while all of the witnesses were testifying about events that occurred some months ago, the three security officers made careful contemporaneous notes, which they used to refresh their recollections. Finally, I have taken into account the fact that the grievor was smoking marijuana during the morning of October 2nd, so that when he was confronted, around lunchtime, he may still have been impaired to some extent. In the circumstances, one might not expect a crystal clear memory of events.

12. With these factors in mind, I am satisfied that I should prefer the evidence of the employer's witnesses, wherever there is a material conflict with that of the grievor.

13. For completeness, I should note that although the grievor opted to testify on his own behalf, he did so under the protection of the *Ontario Evidence Act* and the *Canada Evidence Act*, so that his answers could not be used against him in later proceedings.

BACKGROUND: THE WORK SETTING

14. Ontario Hydro operates a number of nuclear generating stations, one of which is located at Pickering, Ontario. At the Pickering facility, Hydro employs more than 2,000 operating personnel, as well as several hundred construction workers.

15. The level of construction activity at Pickering - and thus the construction labour force - fluctuates from year to year in accordance with the need for repair or renovation of the operating system. These construction employees are represented by trade unions and are covered by a collective agreement. Construction labourers are represented by Local 506 of the Labourers' International Union, which, in turn, is a member of the Ontario Allied Construction Trades Council, that bargains with Ontario Hydro.

16. The grievor is a construction labourer who has worked at the Pickering site, sporadically, for a number of years. His most recent period of employment commenced in April 1994.

17. At the time of hire (or rehire), every construction employee undergoes a training and orientation session, to acquaint the new employee with local work rules - including safety requirements. Each new employee is provided with an information package from the manager of his division. The new employee "signs off" on this package to confirm that he has received it.

18. The material received by the grievor on rehire contains the following paragraph:

Possession and/or Use of Alcohol/Drugs

The possession, consumption of use of alcohol or illegal drugs on Ontario Hydro property is prohibited. The Corporate Policy is that "anyone found in possession or using alcohol or illegal drugs on Ontario Hydro property will be subject to immediate termination of employment".

Suspected possession of, or trafficking in illegal drugs, both on or off site, will not be tolerated and shall be referred through Security to appropriate law enforcement agencies. We believe that it is in everyone's interest, for reason of safety, that this policy be maintained and strictly enforced.

Safety

On any construction site, there are numerous rules and regulations which must be obeyed to enhance the safety of all. These rules will be explained to you in a safety indoctrination for new employees session. Your foreman/general foreman is also available to assist you if you have any questions about safety - be sure to ask first and work safely at all times. Employees who work in an unsafe manner may be subject to discipline.

(emphasis added)

19. The grievor signed the orientation package on April 5, 1994.

20. The grievor testified that he could not remember reading these rules, that he did not know that there was a rule against drugs and alcohol in the workplace, and that he "hadn't really thought about" whether the company condoned the use of drugs or alcohol at work. The grievor said that he was confused, and that he did not really appreciate how seriously the company viewed the issue. On the other hand, the grievor conceded in cross-examination that he had worked in the construction industry for many years, and he had never encountered an employer who condoned drug use on a work site.

21. I am satisfied therefore, that the grievor was well aware that it was wrong for him to possess or use drugs at the nuclear facility, and that if he were caught, his job would be "on the line". The company's "zero tolerance policy" is well-known and quite clear. To repeat, it provides that:

"Termination will occur on a first offence in cases [of] possession, sale, or consumption of alcohol or drugs on Ontario Hydro property."

22. Immediately after the grievor's discharge, the company issued a memorandum to all staff, concerning the use of drugs or alcohol at work. *That memorandum was co-signed by all of the trade union groups representing employees on the site.* It reads as follows:

Subject: Drug and Alcohol Use On-Site

There have been two recent events at Pickering involving evidence of drug and alcohol use on-site. In one event, an empty liquor bottle and used, home-made "hash" pipes were found. The other event involved empty beer cans found on Pickering "A" 339' elevation.

These events constitute violation of Ontario Hydro Safety rules and federal laws and must be reported to regulatory authorities. Given current concerns about the quality of our work and our operating license application, it is particularly troubling to the public, the regulators and to us as employees to hear that we could have people involved in the operation of this nuclear power plant who are perhaps less than fully alert due to use of these substances. These events are completely unacceptable and must be stopped immediately.

Management will be making a number of changes to prevent recurrence of these events. These will include tightened access into the operating island. Although management is ultimately accountable for correcting this problem, it is every employee's obligation to report illegal behaviour. To that end, it is requested that you report any illegal activity to your supervisor, employee representative and/or Security.

If you have a substance abuse problem, then you should seek help through the Employee Assistance Program. If you do not do so and are caught using alcohol or illegal drugs on-site, you will be subject to disciplinary action which could include immediate termination.

(emphasis added)

23. This memo does not constitute complete union endorsement of the “automatic discharge feature” of the company’s “zero tolerance policy”. Nor does the memo have contractual force. Nevertheless, there can be no doubt that unions and management have the same attitude to drugs and alcohol in the workplace: there shouldn’t be any.

24. Accordingly, to the extent that the “just cause standard” depends upon local norms and expectations, there is no doubt that this memo supports the employer’s policy of zero tolerance. The collective bargaining parties have confirmed that drug use at work is a serious offence which exposes the user to “immediate termination”.

25. Nor is it difficult to understand why, on this subject, the unions and the employer are in substantial agreement.

26. The operation of a nuclear generating facility poses a unique range of risks, which can only be avoided if all personnel scrupulously adhere to safe work practices. In fact, it is precisely *because* minor errors can lead to serious consequences, that a nuclear facility is subject to rigorous inspection by the federal regulatory authorities, and is exposed to a high degree of scrutiny by a concerned public. It is in everyone’s interests to minimize these risks.

27. In the fall of 1996, the Pickering facility was undergoing a licensing review, and had received a number of critical comments from advocacy groups - both in public hearings and in the local press. Among those criticisms was an attack on the company’s alleged inability to control drug and alcohol use by its employees. And as the memo acknowledges, there was some basis for this concern, because evidence of drug/alcohol use had been found, even though the users had not been identified. So the incident with the grievor occurred at a time when the company was particularly (and legitimately) sensitive to this issue.

28. It is not disputed that the grievor’s job required a degree of perception, alertness and judgement, or that the performance of his ordinary functions would be fraught with danger if his faculties were impaired. Pickering is an operating nuclear generating facility as well as an ongoing construction site, where one can expect to encounter moving machinery and equipment that has to be handled carefully. There are bulky cylinders containing inflammable gases (acetylene, propane) which have to be properly connected, secured, or moved about - often at great heights. Tools and materials have to be hoisted from one level to another. Employees have to negotiate elevated catwalks and stairways, or work in confined spaces. Instruments have to be handled prudently, working with others in a co-ordinated effort. And so on.

29. However, this is not just an ordinary construction site with an industrial facility close by. In addition to the “ordinary hazards” which might be encountered on any construction project, this is an operating nuclear facility, with hazards unique to this environment - including the potential release of radiation. And, quite apart from any safety problems that could be triggered by damage to the company’s operating system, there would be significant commercial consequences if a reactor had to be shut down to deal with a local accident or to effect repairs. Mishaps are costly from both a safety and economic perspective.

30. There is no doubt therefore that impaired judgement could have serious consequences for an employee and his fellow workers; or that an accident could have devastating ramifications in a nuclear environment, where the company makes prodigious efforts to minimize radiation hazards. That is why the company, the trade unions, the regulatory agency, and public critics all agree that there must be strict adherence to the safety regimen, if these risks are to be minimized.

31. In summary, there are personal, public, and commercial interests at play in this setting, and they all point in the same direction. They suggest that a “zero tolerance policy” makes sense. This is not a “moral” or “societal” condemnation of drug use - as perhaps animates the federal drug laws. Rather, it is a reflection of the employer’s obligation to provide a safe workplace, and the employees’ obligation (to himself and his co-workers) to work safely.

THE EVENTS OF OCTOBER 2, 1996

32. On the morning of October 2, 1996, an operating employee (“the informant”) came to see Lloyd Tryon, a security supervisor. The informant complained about what he described as a serious safety violation: he said that a construction worker was using a remote area of the power house, called the “valve room”, to sleep and smoke marijuana. The informant wanted it stopped.

33. The informant explained that he was familiar with the odour of marijuana, and that there was no doubt in his mind that the construction worker had been smoking marijuana on a number of occasions over the past two weeks. The informant said that every time that he was in the area of the “valve room” (2-4 times per shift), he would observe the construction worker sleeping, or apparently asleep, and on several occasions the odour of burnt marijuana was still in the air. The informant demanded action - although he said that he did not want to be identified as the one who had lodged a complaint.

34. It was agreed that Tryon and two other security personnel would meet the informant, at noon, in the area of the alleged incidents, so that the informant could show them where the drug smoking was going on. Since the “culprit” was expected to be at lunch during this period, the security guards anticipated that they would have a free hand to investigate.

35. As agreed, at about 12:00 p.m., Lloyd Tryon, Jim Beatty, and Tom Brady met the informant in the vicinity of unit #8 where the valve room was located. The three guards then climbed up several flights of stairs, and made their way to a small room at the “317 foot level”, where the informant said the construction worker had been sleeping and smoking marijuana.

36. This is not a regular work area. It can only be reached by ladder, or by going up a number of steel staircases to the roof, then across a catwalk to the door leading into the valve room. It is an isolated spot where there are no employees stationed. There is no reason for a construction worker to be there.

37. When Tryon, Brady and Beatty reached the valve room, they observed a sheet of plywood fashioned into a make-shift bed, complete with a bag of white cotton gloves for a pillow. At various places on the cement floor they observed what they believed to be signs of marijuana smoking. In his notes, Tryon recorded that he saw: “tiny portions of marijuana plant, seed and paper, burnt and ground into the floor”. The other two guards testified that they saw matches, ash, and what they took to be a “roach” - that is, the remains of a marijuana cigarette that were much smaller than a normal cigarette butt. However, after a brief inspection, the guards left the area undisturbed, and resolved to come back after lunch when, (according to the informant), the construction worker was expected to return to his hiding place.

38. Tryon directed Beatty and Brady to return to the area about 1:30 p.m. Tryon told the two guards that if there was no marijuana smoke in the air, they were to approach the employee and make a note of what was said and what they saw. The guards were also instructed to take careful note of any attempt to hide or destroy evidence. But they were not to search the employee unless he was “caught in the act”, nor were they to detain or arrest him. They were to report to Hydro Security and members of management, using the telephone located in the valve room.

39. Beatty and Brady did as they were instructed. They returned to the valve room about 1:30 p.m. and found "N", lying on the plywood bed with his hands on his chest, apparently holding something. There was no marijuana smoke in the air, but according to the two guards, the grievor was acting suspiciously.

40. The grievor was surprised, of course, by the guards' sudden appearance. According to the guards, he hastily moved to conceal something that he had in his hands, then appeared to slip something surreptitiously into the side pocket of his coveralls. Thereafter, he kept one hand in this pocket for the entire period that the guards were in the vicinity - not only while he was answering questions in the valve room, but also while he was descending the steel stairs to ground level.

41. The guards thought it curious that the grievor would walk across the roof, over an elevated catwalk, then down a steep steel staircase, without holding on to the handrails. They were also worried that he seemed to be edging towards an open grate, where contraband material might be disposed of irretrievably. Brady took up a position over the grate, and both guards watched the grievor quite carefully.

42. The two guards reported their initial observations from the telephone in the valve room, and arranged to meet Lloyd Tryon at ground level. They told the grievor that they were taking him to see a supervisor.

43. The grievor protested that he had not done anything wrong. The grievor said that employees often took unauthorized breaks in remote areas where they would not be seen. The grievor said that he had no direct supervisor. He said that he was "on call", and carried a pager so that he could be reached by anyone who wanted him.

44. In the course of these events, the two guards carefully followed the instructions that they had been given. They made no effort to "arrest" or "detain" the grievor, nor did they make any effort to search him. They merely told the grievor that he had been found in an unauthorized area, and that they were all going to have to discuss the situation with a supervisor. The guards did not mention the possession or use of marijuana.

45. The grievor made no effort to leave; but, of course, that is not surprising. The grievor was not an ordinary citizen in a public place. He was an employee, at work, on the company's premises. He had been found idle in an unusual place. He was being confronted by a representative of management, and told that he would have to explain the situation to another representative of management. In the circumstances, one would not expect an employee to refuse to accompany the security guards, let alone flee the scene.

46. Shortly after the grievor and the two guards reached ground level, Lloyd Tryon arrived and identified himself as the "security supervisor". There was then a short interchange about the grievor's sleeping on the job. As before, the grievor maintained that his job took him to all parts of the plant, that there was nothing unusual about "resting" when he was not busy, and that he could be reached by pager if he were needed. The grievor protested that he had done nothing wrong.

47. After a brief discussion along these lines, Tryon told the grievor that he was not really concerned about whether the grievor was sleeping on the job. The problem was much more serious than that. Tryon told the grievor that he had been under close surveillance for some time, and that it was well known that he was routinely using the valve room to smoke marijuana (i.e. Tryon put to the grievor what the informant had reported to Tryon earlier that day). At this, the grievor replied, "Look, can we talk about this? I only smoke it for my own use. I don't sell or anything".

48. Tryon then asked if the grievor was currently in possession of any drugs. The grievor replied, "If you've got surveillance, then you already know". The grievor then reached into his coveralls and produced a blue change purse from the pocket that had earlier been the focus of the guard's suspicion. The change purse contained a small amount of marijuana.

49. The grievor testified that he had brought a quantity of marijuana to work earlier that day, but because he had smoked some of it before lunch, he was not sure whether there was any left when Tryon asked him for it. The grievor testified that, at the time, he didn't really know whether he was "in possession" of marijuana.

50. In this regard, it is interesting to note that it is not so easy to smuggle contraband into this particular workplace. In order to prevent the transfer of contaminants, employees reporting for work must discard all of their street clothing, put their personal effects in a locker, cross a room naked, then get dressed again in work clothes prescribed by the company. Personal items must be carried from one area to another in a small plastic bag. That is how the grievor brought marijuana into the workplace.

51. Since the grievor did not stow his drug supply in his locker, the only reasonable inference is that he brought this material to work in the expectation that he would be smoking it there. And that was the grievor's evidence at the hearing. The grievor testified that he had smoked marijuana earlier that day - indeed, that he had been regularly smoking marijuana every day since the late summer of 1996.

52. The grievor testified that although he does not drink, he has smoked marijuana - *occasionally* and *recreationally* - for many years. He said that, for the most part, it has not been a problem. He said that he began to smoke more frequently for a period in 1990 after a car accident (not drug related), and that this prompted him to approach a psychiatrist for assistance. That psychiatrist prescribed a regimen of counselling and medication, but the grievor abandoned the effort after a few weeks. Nevertheless, the grievor said that he had encountered no further difficulties with marijuana over the next few years. The grievor testified that he continued to smoke the drug, from time to time, but it had no real impact on his daily activities.

53. The grievor testified that, until relatively recently, he never smoked marijuana during working hours. That behaviour did not begin until the summer of 1996, when the grievor was under a lot of personal pressure. The grievor testified that in the summer of 1996, his mother was terminally ill, and his wife was about to deliver their first child.

54. I should note that when the grievor was confronted by security personnel on October 2, 1996, he did not reveal that he had been smoking marijuana regularly *at work*. He did admit to Tryon that he smoked marijuana *outside the workplace*, and explained that he did so because he had personal problems. The grievor said, "I don't want to lose my job. Can't we talk about this? Can't you give me a break?" Tryon replied that there was nothing to talk about, and that, no doubt, the grievor would lose his job, because the company's policy prohibited drugs or alcohol on the work site.

55. Tryon then told the grievor that he was "under arrest", that he was going to be searched to see if there were any other drugs. Tryon advised that, thereafter, he would be taken to see the construction supervisor and other members of management. In response to the grievor's inquiry about the word "arrest", Tryon explained that he was a "special constable" who was entitled to make an arrest.

56. Tryon told the grievor that he had no intention of involving the police, and that, from his perspective, the matter should be handled as an internal disciplinary matter. Tryon said that the grievor would lose his job. However, Tryon added that it was really up to Ontario Hydro to decide whether to

involve the local police, and because it was possible that the police might be involved, Tryon told the grievor that he was not obliged to say anything further.

57. However, Tryon did not give the grievor this “caution” earlier in the piece, nor did Tryon advise the grievor that he could or should speak to a lawyer.

58. Tryon then proceeded to search the grievor. No further drugs were found.

59. I might note that in the course of his evidence before this Board, the grievor insisted that it was Tryon’s search that discovered the illegal drugs. The grievor maintained that he did not produce the blue change purse on his own, or in response to questioning.

60. However, all three guards dispute this scenario, and I prefer their evidence on this point. I am satisfied that the grievor did produce the blue change purse when he was confronted by Tryon, accused of smoking marijuana on the job, and told that he (the grievor) had been under close surveillance for some time.

61. This reference to “surveillance” was, of course, untrue. There had been no surveillance at all. Tryon merely put to the grievor what he had learned from the informant. On the other hand, there is also no doubt that the informant’s observations were quite accurate; so it is not surprising that the grievor responded the way he did. The grievor knew that the accusation was true: he had been smoking marijuana, on a regular basis, at work.

62. In any event, I am satisfied that the search was conducted only *after* the grievor had produced the marijuana and had admitted that he was a regular user.

63. Shortly after this interchange with the security staff, there was a brief meeting in the office of John Douglas, the supervisor of construction engineering. Douglas was joined by Phil Scofield, the general foreman. The grievor was accompanied by the chief union steward, who spoke to the grievor briefly before the meeting started.

64. Douglas reviewed the facts as he understood them, and indicated that Hydro’s drug policy called for immediate termination if someone was found in possession of drugs. The grievor replied that he had a lot of personal problems, and that he had tried to give up smoking marijuana but had been unable to do so. The grievor asked if there was any alternative to discharge. Douglas responded that the company had an Employee Assistance Program (EAP) that (*inter alia*) addressed employee drug dependency; but that employees were expected to approach the EAP on their own, before there were problems in the workplace.

65. Douglas told the grievor that, from the company’s perspective, the grievor had engaged in serious misconduct for which there was an established policy and a prescribed response. In the company’s view, it was too late to engage the EAP.

66. Douglas testified that he discharged the grievor in accordance with the company’s “zero tolerance” policy, because in his view, he had no alternative. The policy was clear, it did not contemplate any exceptions, and the grievor had been found with marijuana on his person. The prescribed penalty was discharge, and that is what Douglas considered appropriate.

67. It is not clear whether the grievor was aware of the EAP prior to his discharge. The EAP is well publicized in the workplace, but, according to the grievor, he did not pay much attention to notices or posters on the employee bulletin boards.

EVENTS FOLLOWING THE GRIEVOR'S DISCHARGE

68. The grievor's discharge was finalized on October 2, 1996. His grievance was referred to arbitration before this Board on November 8, 1996. On November 14, 1996, the grievor attended Pinewood Centre (associated with Oshawa General Hospital) for an assessment interview concerning his drug use. Thereafter, he attended a number of counselling sessions to address this issue.

69. The grievor's testimony in this regard is supplemented by three letters from an "addiction's counsellor" associated with the Pinewood Centre. The second letter, dated March 11, 1997, includes these comments:

"N" attended Pinewood Centre's Ajax Office for his assessment interview on November 14, 1996. "N" agreed to attend the Guided Self-Change Program (GSC) which ran from January 8-29, 1997. The GSC Program is a four session early intervention program which assists clients to reduce their substance use. It also is geared to strengthen client motivation and commitment to change. Following the GSC Program, [which ended January 29, 1997] "N" opted to abstain from cannabis use and to participate in the Structured Relapse Prevention Program (SRP), which runs from February 12 - April 9, 1997. The SRP Program is an eight session program to assist clients in identifying high risk situations associated with substance use and to develop coping strategies to offset the triggers and urges related to those situations.

• • •

"N" has reported abstinence from cannabis use for 31 days and is an active participant in group discussion. He is slated to complete the SRP Group on April 9, 1997. On April 14, 1997 "N" has a case management meeting scheduled to discuss further treatment options, if any.

A later letter dated May 26, 1997 repeats that information and contains these additional observations:

"N" completed the Structured Relapse Prevention Program on April 9, 1997. He was an active participant in group, sharing personal experiences, challenging others with feedback, and receiving feedback from others. He reported overall progress and success in his identified goal of abstinence from cannabis use. "N" was given the options of continuing in a Relapse Prevention Maintenance group for added support or attending monthly case management meetings. "N" reported overall confidence in maintaining his goal and opted for monthly case management meetings. His next case management meeting is June 11, 1997.

70. As will be seen, the letters from Pinewood describe the program in which the grievor enrolled and *the grievor's own assessment* of his progress. The addiction counsellor does not express any views of her own as to whether the grievor has or has not abstained from cannabis use since his involvement with Pinewood. Nor is there any opinion as to whether the grievor was or was not actually "addicted" to cannabis, or whether that substance has addictive properties, or whether it would pose a risk to reinstate the grievor to the work setting described above. Indeed, there is no indication that the addiction counsellor was aware of that work setting, or this litigation, or the circumstances that brought the grievor to Pinewood, or the grievor's earlier unsuccessful effort to abstain from smoking marijuana.

71. The addiction counsellor did not give evidence before the Board; and, strictly speaking, the letters are not a "medical opinion" at all: the addiction counsellor is not a physician. More significantly, though, the letters do not make a clinical diagnosis of "addiction" or express any firm prognosis for recovery - let alone express the opinion that the grievor has fully recovered. There is no independent verification (by drug testing, for example) that the grievor has not been using his drug of choice, and there is no assessment of the likelihood that he will continue to abstain (which is to say, the likely success of the monthly meetings which *the grievor* has opted to attend). There is no indication of what *the counsellor* thinks might be necessary to address the grievor's problem.

72. These “gaps” or “questions” are troublesome, when one recalls the grievor’s testimony that in 1990, he was involved in a much more concerted program directed by a physician which the grievor abandoned after a few weeks. That program didn’t work out - as subsequent events seem to have established - so it is not at all clear what to make of the grievor’s commitment to attend one counselling session a month.

73. This is not to say that the letters from the addiction counsellor are misleading in any way. It is simply that they do not provide a strong foundation for the grievor’s alternative defence of “addiction/ disability followed by successful recovery”; and because the counsellor was not called as a witness, she had no opportunity to amplify her views.

74. Nor was the grievor’s own testimony completely consistent with his alternative defence, or with the position described in the letters from Pinewood.

75. As I have already noted, the grievor testified that he has been an occasional marijuana user for many years. But the grievor did not think that his situation was much different from someone who drank alcohol on a regular basis. The grievor testified that the only time that he became a heavy user was in 1990 when he was involved in a car accident and sought help from a psychiatrist, and again in the summer of 1996, when he was experiencing family problems.

76. The grievor told the Board that *he did not regard himself as “drug dependent”*. The grievor said that, as a result of his counselling sessions, he was satisfied that he did not need to smoke marijuana in order to cope with his problems and that he was confident that he would be able to refrain from doing so. On the other hand, he admitted in cross-examination that he had continued to smoke marijuana after *January 29, 1997* when he completed the “Guided Self-Change Program” mentioned above (and, according to the counsellor’s letter, had “opted to abstain from cannabis use”). And, of course, his effort in 1990 proved unsuccessful.

77. It is not clear when the grievor stopped smoking marijuana - if indeed he has actually stopped completely. What is clear is that, even accepting his evidence, he continued to smoke marijuana for some months after his discharge, and for many months after the personal difficulties that, he said, accelerated his marijuana use. His mother’s death occurred in August 1996, and his child was born, without complications, in early September 1996.

78. There is no professional evidence about the grievor’s stress tolerance, or whether, as he suggests, stress is a cause or “trigger” for his drug use. What can be said is that the sources of stress described by the grievor are the ordinary events of life; so that unless he really has come to grips with this situation, he remains at risk of using drugs again - as apparently happened after 1990.

DECISION

I - OVERVIEW

79. Before turning to the union’s “Charter argument” (unlawful search and seizure, the right to counsel, the grievor’s privacy interests, and so on), I think that it is useful to consider the labour-relations context in which this case arises, and the way it should be decided *absent Charter considerations*. For the Charter is only one element in the case; and while the union focuses on *the grievor’s rights* and *the grievor’s* personal problems, one also has to keep in mind the employer’s concern: which is the *grievor’s behaviour* at work and the *consequent threat to himself, to his fellow workers, and to members of the public* who might be affected by an industrial accident. It is not at all clear how the Charter fits into this employer-employee equation or the framework of collective bargaining law; and in determining that

impact, I do not think that it is inappropriate to keep in mind the operational impact in the particular setting under review.

80. From a labour-relations perspective, what is at issue in this case is the grievor's conduct in the workplace, and whether that conduct warrants termination of his employment relationship with Hydro. This is not a proceeding in which the grievor is pitted against THE STATE - at least as conventionally conceived, nor is an employer-employee relationship (or the alleged breach of an employment contract) something that typically attracts Charter scrutiny. Hydro's actions have not put the grievor's liberty at risk and the grievor's liberty is not at risk in these proceedings either. He faces no fine or other criminal sanction. This is an essentially civil proceeding, that is not even governed by the strict rules of evidence (see section 48(12)(f) of the *Labour Relations Act* and the decision of the Divisional Court in *Re Greater Niagara Transit Commission and Amalgamated Transit Union, Local 1582* (1987), 61 O.R. (2d) 565). And in a civil proceeding (with the grievor in a role analogous to a "plaintiff") there is no firmly established "privilege" against self-incrimination.

81. No doubt, in appropriate circumstances, the Charter may be engaged as part of the legal analysis of work-place events - just as, on occasion, an arbitrator may be called upon "to interpret and apply human rights and other employment-related statutes, despite any conflict between those statutes and the terms of the collective agreement" (to quote the provisions of section 48(12)(j) of the *Labour Relations Act*). However, the grievor's principal claim in this case is that he was discharged "without just cause" contrary to the terms of a negotiated collective agreement; so it may be useful to begin with the articulated reasons for that discharge, and determine whether, in the ordinary course, the fact of smoking drugs in a nuclear generating facility gives an employer "just cause for discharge". The Board will then turn briefly to whether the employer is prohibited from relying upon these facts because of the manner in which certain evidence was obtained. Finally, I will consider the union's alternative argument that the grievor's behaviour was rooted in a "disease" (addiction) from which he has recovered or which is now in remission.

II - CHARTER CONSIDERATIONS ASIDE: IS THERE JUST CAUSE FOR DISCHARGE?

82. From Hydro's perspective, this problem came to its attention when an employee complained that a fellow worker was using drugs and demanded that Hydro put a stop to it. The complainant was identifying an unsafe work situation (as he was perhaps obliged to do pursuant to the *Occupational Health and Safety Act*), and Hydro immediately investigated that complaint (as it was also obliged to do under the OHSA). As a result of that investigation, Hydro determined that, at the very least, the grievor was a marijuana smoker, that he had some marijuana in his possession, and that he had brought the drug into the work place through the screening procedure described above. There was a strong inference that he brought the marijuana to work with the intention of smoking it there, and the evidence before this Board confirms that, for at least a four to six-week period (and perhaps longer), the grievor did smoke marijuana at work on a regular basis.

83. In other words, the allegations raised by the fellow employee are undoubtedly true.

84. Leaving aside for the moment whether the employer can rely on the evidence establishing these facts, and whether Hydro must comply with the Charter when enforcing its safety rules, would the situation support the grievor's discharge?

85. In my view it would.

* * *

86. This is a "construction case", the grievor is a "construction worker", and the grievor is working in an environment which is, to say the least, extremely "safety sensitive". Given the nature of

a nuclear facility, the employer has a well-founded and legitimate concern about safety. Hydro is obliged, by statute, to promote a safe work environment. The grievor's co-workers are entitled, by statute, to demand it.

87. There is really no dispute that the grievor's job requires a degree of perception, alertness, and judgement. Any impairment of his faculties increases the risk of accident, and endangers not only his own life, but also the lives of fellow workers (hence the informant's complaint). This concern is confirmed and underlined by the joint union-management statement reproduced above. The parties expectations and the collective bargaining regime are completely congruent with statutory norms - and with common sense.

88. This is not to say that the union-management statement constitutes an amendment to the collective agreement or a "specific penalty" within the meaning of section 48(12)(17) of the *Labour Relations Act*. However, that joint statement is a reflection of the operating and collective bargaining environment; and that is something that an arbitrator can take into account when determining whether there was "just cause" for discharge. For to some extent, the concept of "just cause" takes its colour and content from the context in which those words are to be applied, and in this case it is evident that Ontario Hydro and its unions take a dim view of drug use in the workplace.

89. The arbitral jurisprudence makes it perfectly clear that for employees in safety-sensitive positions, the consumption of alcohol or drugs is a serious offence that warrants discharge unless there are compelling mitigating circumstances. (See for example: *Re Brewers Warehousing Co. Limited and United Brewery Workers, et al.* (1984), 16 L.A.C. (3d) 85; *Re Inter-City Truck Lines (Canada) Inc. and Teamsters Local 880* (1988), 32 L.A.C. (3d) 371; *Re Corporation of the Borough of East York and CUPE Local 114* (1990), 11 L.A.C. (4th) 133; *Re Canadian National Railway Co. and United Transportation Union* (1994), 43 L.A.C. (4th) 124; *Re Pacific Elevators Ltd. and Grain Workers Union Local 333* (1991), 22 L.A.C. (4th) 346; *Re Canadian National Railway Co. and CAW Local 100* (1993), 33 L.A.C. (4th) 17; and *Re Mitchell Island Forest Products Ltd. and IWA Local 1-217* (1996), 60 L.A.C. (4th) 73.) Truck drivers, construction workers, locomotive engineers and construction workers (etc.) work in a very different environment from file clerks or teachers. Any impairment of their faculties could have serious consequences for themselves and others. Thus, in *Schindler Elevator Co. vs. International Union of Elevator Constructors, Local 50* (unreported), Board File No. 0539-96-G, November 13, 1996, the Board recently observed that:

24. There is no doubt that elevator mechanics, be they on a regular maintenance route or working as a service mechanic, work in highly dangerous circumstances. As was brought out in the cross-examination of various grievors, particularly Mr. McKechnie, the maintenance which is performed on elevators requires a mechanic to work with tools on numerous moving or rotating parts, often while perched on top of a moving elevator. The mechanics regularly perform their work in short sleeve shirts, and without rings or jewellery, for safety reasons. The mechanic may be working on one elevator while other elevators are moving around him. The work involved is highly complex and far from routine. The severe harm that could befall a mechanic should he lose his balance or momentarily lose his concentration in whole or in part due to the consumption of any alcohol or drugs, whether consumed on work hours that are paid or unpaid, is patent.

25. There is also a safety concern regarding the public. As a general observation, it can be fairly stated that most individuals encounter one or more elevators in a typical business day. For the most part, the public takes the proper functioning of elevators for granted. It is, perhaps, a testimony to the high quality of work performed by elevator mechanics and helpers that the public can ride in elevators without fear of mishap. Consider, though, the potential for severe injury or death that could result from the faulty repair or maintenance of an elevating device. The failure by an elevator mechanic to properly perform his job because of the consumption of any alcohol or drugs, irrespective of when it was consumed, could have significant consequences for the public, the mechanic, and the employer, both financial and otherwise. Mr. McCann conceded this in cross-examination.

26. There are certain business interests of the employer which were also relied upon by counsel during argument. Should one or more members of the public be injured or killed as a result of negligence or carelessness caused or contributed by the use of alcohol or drugs by a Schindler employee, there would be direct and significant business consequences for Schindler. Additionally, each of the grievors drove to Austin's in a Schindler vehicle, and the potential consequences of driving such a vehicle when affected by alcohol or drugs are obvious. There are also other consequences to Schindler when a mechanic drinks alcohol during the work day. The evidence established that mechanics regularly come into contact with customers (including engineers, property managers and building superintendents) at both residential and commercial accounts. There was evidence that on at least one occasion a client smelled beer on the breath of its mechanic. It cannot be to the benefit of Schindler to be perceived by the public as permitting the consumption of alcohol or drugs by its mechanics. In this context, Schindler also has an interest in limiting the use of alcohol or drugs during working hours. There is also a business interest in precluding a mechanic wearing a Schindler logo from consuming beer during the entire work day, on the basis that to permit consumption of beer in those circumstances may well affect the public's perception of Schindler's operations.

The Board went on to say:

27. I am of the view that the employer has established significant, legitimate interests which permit for the conclusion that the rules imposed by it regarding the use of drugs and alcohol are reasonable, in the circumstances of this case. Quite simply, the consequences of a Schindler employee becoming affected by the consumption of any alcohol or drugs at lunch are so significant, to the mechanic, the public, and the employer, that a "zero tolerance" rule is warranted. It should be kept in mind that the evidence established quite clearly that, for the most part, the elevator mechanics employed by Schindler are unsupervised and therefore not subject to direct managerial control. It is not realistic to permit the individual mechanic (as counsel for the employer put it) "to be his own liquor control board". The potential consequences of individual error are just far too severe. If the above interests are to be protected, the only reasonable means of doing so is to preclude Schindler employees from consuming alcohol or drugs at any time during the working day, whether the time is paid or unpaid.

90. These observations are consistent with a long line of cases that suggests that, in certain industries, there must be an uncompromising standard in order to deter conduct that so seriously threatens the safety of others - and, in many cases, the public as well. It is not a question of work performance, as such, but whether the safety of other workers or the public is put in jeopardy by the impaired worker. And, as will be seen, this case is a lot like *Schindler*.

91. In this case the employer's business is a hybrid of the nuclear and construction industries, and, in my view, an employer in that setting is entitled to demand that employees refrain from possession or consumption of intoxicating substances while at work. I do not have to reiterate the human and commercial consequences of an industrial accident. Quite apart from that, though, the employer is under a *statutory obligation* to maintain a safe workplace and to take reasonable steps to ensure that employees are not exposed to preventable risks - whether such risks arise from dangerous machinery, noxious substances, or unsafe work practices. One element in a prevention program is the imposition of discipline, to deter employees who might be disposed to break the rules - especially when employees know that the risk of detection is low and the employer's problems of proof can be significant.

92. Against that background, there is something to be said for certainty of result, when, as in this case, the company actually *has* been able to establish the contravention of its work rules. Indeed, in the company's submission, to do anything else "sends the wrong message" to employees like the grievor, who either knew the rules but did not think that he would be caught, or seems to believe that despite the company's published policy, an arbitrator would not likely uphold a termination. There is also much to be said for the company's submission that "zero tolerance" and the "certainty of discharge" are both necessary to effect general deterrence; and that the work-place safety regimen of this nuclear

facility would be undermined if a drug-smoking construction worker were able to escape responsibility for his behaviour.

93. I do not suggest that arbitrators should respond mechanically to the problem of alcohol or drug use in the workplace. It is necessary to be sensitive to the grievor's individual circumstances, as well as the context under review. For, as I have already noted, there is a world of difference between an impaired file clerk and an impaired construction worker - particularly one that works in an operating nuclear generating facility. But here, the work setting and the bargaining parties' understanding both point in the same direction: drug smoking in *this workplace* is an exceptionally serious matter and, *prima facie*, employees who engage in that misconduct, should expect to be discharged.

94. In the instant case, the grievor engaged in serious misconduct, which he knew the employer would not tolerate. That is why he chose a remote location where he did not expect to be discovered. The grievor brought marijuana into the plant and smoked it during working hours - not just once or twice, but on numerous occasions over at least a 4 - 6-week period. Not to put too fine a point on it: the grievor acted with callous disregard for his own safety and for the safety of his fellow workers; and he exposed the company to the prospect of serious criticism and commercial consequences - not least because, at the time, the company's safety practices were under intense scrutiny by public interest groups and its regulatory agency.

95. This is not a case where the employer has tolerated the grievor's behaviour or has singled him out for special treatment. There is no discrimination here. The company has taken steps to put all employees on notice of their obligations under the collective agreement, by including the workplace rules in the orientation package provided to all employees when they come on site. In a couple of cases where an employee's drinking problems were detected *before* they surfaced on the work site, the employees were diverted into the EAP, and in a couple of cases, alcohol problems led to discharge. However, this is not an employer that has tolerated using drugs or alcohol at work, nor (on the evidence) has there been any case similar to that of the grievor. This is not a situation in which there has been condonation, nor have there been "mixed messages" or a "double standard".

96. Long service is always something which tells in an employee's favour, because employees with long service have an investment in their jobs which should not be lightly erased. In this case, though, the grievor has been employed (most recently) for only 2½ years. While this is not insignificant, neither is it substantial when weighed against the gravity of the grievor's misconduct.

97. In all the circumstances of this case, I am satisfied that the employer had "just cause" to discharge the grievor.

98. To put the matter another way: the company's "zero tolerance policy" is a reasonable one, so that a construction worker at a nuclear power site, can expect to be discharged if s/he has drugs or alcohol in his/her possession, or consumes those substances at work.

99. But is the company precluded from *proving* or relying on the grievor's misconduct, because of *its own* breach of the grievor's Charter rights? Does the Charter regulate the way in which the employer goes about enforcing its safety rules, and does the Charter shield the grievor from the employment consequences of his misconduct?

III - THE CHARTER ISSUE

100. Counsel for the union submits that there is no evidence *properly before the Board* to support the employer's position, because its investigation was totally tainted by numerous violations of the

grievor's Charter rights. The physical evidence and the grievor's admissions are all "fruit of the poison tree", and the informant's charges are unsubstantiated hearsay.

101. Briefly put, counsel asserts: that the grievor was subjected to an unreasonable search and seizure for which there was no authority and no reasonable or probable cause; that the grievor was arbitrarily detained; and that he was not "cautioned" in a timely way or informed of his right to speak to a lawyer. Counsel submits that the grievor's admissions and the physical evidence must be completely disregarded - either in the exercise of the Board's discretion, or pursuant to section 24 of the Charter, which reads as follows:

24. (1) Anyone whose rights or freedoms, as guaranteed by this Charter, have been infringed or denied may apply to a court of competent jurisdiction to obtain such remedy as the court considers appropriate and just in the circumstances.

(2) Where, in proceedings under subsection (1), a court concludes that evidence was obtained in a manner that infringed or denied any rights or freedoms guaranteed by this Charter, *the evidence shall be excluded if it is established that, having regard to all the circumstances, the admission of it in the proceedings would bring the **administration of justice** into disrepute.*

Counsel relies on a number of cases including *Weber v. Ontario Hydro* (1995), 82 O.A.C. 321, where the Supreme Court of Canada held that an arbitrator could apply the Charter and was a "court of competent jurisdiction" for the purpose of section 24 remedies. *Weber* - at least implicitly - suggests that the Charter applies to Ontario Hydro's employer-employee relationships.

102. This Charter argument raises a variety of interesting legal questions, including:

1. Is Ontario Hydro an entity to which the Charter applies at all; and, in particular, does the Charter apply to the company's employer-employee relations and the administration of a negotiated collective agreement?
2. Were the security guards subject to the Charter when they confronted the grievor on company premises during working hours and questioned him about his drug use; and, in particular: was he arbitrarily detained, did he have a right to remain silent, did the guards have an obligation to advise him of such rights, and should the grievor have been told to speak to a lawyer?
3. Does it matter that one of the guards was a "special constable" who purported to "arrest" the grievor; or, despite the terminology used, was this really the exercise of "managerial" rather than "state authority"?
4. Was there an unreasonable search and seizure under the Charter and/or a common law tort which taints the physical evidence and precludes its use? What about the grievor's admissions?
5. Does it matter that the evidence in question is being tendered in a *civil proceeding*, somewhat analogous to a wrongful dismissal action, where the grievor is challenging the employer's decision but does not face THE STATE, as such, or state-imposed sanctions of fine or imprisonment?
6. If there has been a Charter breach, would the admission of the impugned evidence "bring the administration of justice into disrepute"? What do these words mean in the context of an arbitration proceeding?

103. This list is not exhaustive, and, of course, the company would answer "no" to all of these questions.

104. Again, in brief: the company submits that the Charter has no application to its relationship with its construction employees or to the way in which it investigates violations of workplace safety policies. In the company's submission, neither the Charter nor the criminal law applies in these circumstances - not least because, in the instant case, no police were involved, no charges were laid, and no state penalties were ever contemplated. The company merely decided on the basis of the information received that the grievor was not a suitable employee.

105. The company asserts that despite some of the language used by the guards, the authority to which the grievor was submitting was not that of *the State* - but rather that of an *employer*, who was entitled to question the grievor about his activities, demand that he turn over any contraband, and invoke the civil sanction of discharge. The company points out that, in a nuclear environment, there are a number of rules and restrictions that the company is required to enforce on its premises; and, in the company's submission, this rule is not much different. Indeed, the company is obliged to take action to maintain a safe work-place. Whether or not evidence of the grievor's drug use would be admissible in Court in a criminal proceeding, it is properly put before an arbitrator to establish "just cause" for terminating an employment relationship.

106. The company submits, in the alternative, that even if there was some tort or Charter breach, it would be inappropriate to exclude the impugned evidence - especially given the serious safety concerns involved, and the fact that the employer was not asserting some State interest, but rather was trying to protect its employees and the public, at the instance of one of those employees. The company submits that even under Charter section 24, there is a discretion to admit "tainted evidence"; and the phrase "bring the administration of justice into disrepute" was never meant to apply to grievance arbitration proceedings arising under a negotiated collective agreement. Indeed, counsel goes so far as to suggest that, if the phrase *does* apply to grievance arbitration proceedings, the process would fall into disrepute if clear evidence of drug use were *not* admitted. If the grievor were to escape responsibility on this basis, it would fuel employee cynicism and undercut objectives to which the union and employer both subscribe.

107. Counsel urges the Board to exercise an informed labour relations judgement, weighing the institutional as well as the individual rights concerned. In his submission, the grievor should not be able to escape *civil* responsibility for his behaviour - any more than a shopkeeper would be precluded from seeking restitution from a thief whose criminal charges had been dismissed on Charter grounds.

108. The employer submits that the Board should admit the guards' evidence in its totality, whether or not such evidence would be admitted in a Court of law. The company relies, among many cases, on *Greater Niagara Transit Commission, supra*, where the Divisional Court held that an arbitrator should receive evidence in an arbitration proceeding even though that same evidence had been excluded from a criminal trial on Charter grounds (though the analysis in that case is not completely congruent with *Weber*); and *R. V. Shafie*, 31 O.A.C. 362 where the Ontario Court of Appeal examined competing authorities and concluded that "actions that at the hands of the police or other state or government agents would be detention do not amount to detention within the meaning of section 10(b) of the Charter when done by private or non-governmental persons". In *Shafie*, the Court expressed concern about what it described as "the judicialization of private relationships beyond the point that society could tolerate", and Krever, J.A. went on to observe:

"The requirement that advice about the right to counsel must be given by a schoolteacher to a pupil, by an employer to an employee or a parent to a child, to mention only a few relationships, is difficult to contemplate."

* * *

109. However, given the way that this litigation unfolded, I do not think that it is necessary to reach any final conclusion about any of these difficult questions, because apart altogether from the

guards' evidence, there is independent testimony establishing the fact that the grievor smoked marijuana at work. And that evidence comes from the grievor himself.

* * *

110. In support of its position, the company tendered the testimony of five witnesses: three security guards and two members of management. The grievor was not called as a witness by the employer - although perhaps he might have been (thus illustrating a significant difference between civil and criminal proceedings). Nevertheless, after the company closed its case, the grievor chose to take the stand on his own behalf, to contradict the company's version of events, and to advance the alternative "defence" that his use of drugs at work was rooted in a "disease" or "disability" which has now been successfully treated. And, having chosen to give evidence, the grievor was subjected to cross-examination.

111. Counsel for Hydro objected to this post-discharge evidence, on the basis of the Supreme Court of Canada's decision in *Compagnie Minière Québec Cartier v. United Steelworkers of America, Local 6869* (1995), 125 D.L.R. (4th) 577. However, the grievor was clearly entitled to testify on other matters, and in the course of cross-examination, counsel elicited the grievor's admission that he had indeed smoked marijuana on numerous occasions, in the 4-6 weeks preceding his discharge on October 2, 1996.

112. Accordingly, even if the evidence of the guards is totally rejected, there is independent evidence that the grievor engaged in the misconduct for which he was discharged; moreover as I have already indicated, this was the kind of conduct for which discharge was warranted.

113. In summary, while there may be some doubts about whether the Charter applies to Ontario Hydro in its capacity as employer (see *Bartello v. Canada Post Corporation* (1987), 18 C.C.E.L. 26) and similar doubts whether, in the circumstances of this case, a Charter breach should result in the exclusion of evidence from this essentially civil proceeding, I do not have to reach any final conclusion about that, because the employer's position is supported by other evidence, unaffected by any Charter taint.

IV - IS THE GRIEVOR'S MISCONDUCT ROOTED IN A "DISEASE" OR "DISABILITY" FROM WHICH HE HAS NOW "RECOVERED"?

114. Since the *Cartier* decision (*supra*), there has been considerable arbitral debate about the use of post-discharge evidence. Some arbitrators have noted the Court's observation that such evidence may be considered if it "sheds light on the reasonableness and appropriateness of the dismissal under review *at the time that it was implemented*", and have admitted the evidence for that purpose. Other arbitrators have pointed out that the Court made no mention of statutory provisions such as section 48(17) [or 48(12)(j)] of the *Labour Relations Act* - which gives the arbitrator an independent *statutory* authority to decide what is "*just and equitable in all the circumstances*". The emphasized words drawn from section 48(17) are clearly broad enough to encompass post-discharge events which might influence the arbitrator's statutory discretion - such as a post-discharge apology with restitution, or, conversely, continued deception or lying at the hearing. Since the statutory discretion is available despite a discharge "for cause", there is no reason to limit the plain words of the legislation to events preceding the discharge. "All of the circumstances" means *ALL* of the facts arguably relevant to the exercise of the statutory discretion. Accordingly, either arbitral approach would permit evidence of a disease which reduces the grievor's personal culpability for the events giving rise to his discharge, but which is under control (or not) by the time of the hearing. (See *Re Mitchell Island Forest Products Ltd. and IWA Local 1-217* (1996), 60 L.A.C. 73, and *Re Alcan Smelters and Chemicals Ltd. and CAW Local 2301* (1996), 55 L.A.C. (4th) 261.)

115. However, for present purposes, I do not have to review these authorities, because, in this case, even if the post-discharge evidence is accepted, I do not think that it alters the result.

* * *

116. There is not much doubt that, today, drug addiction can be regarded as a “disease” that with appropriate attention and treatment can be controlled. Drug addiction is, moreover, a condition with both physiological and psychological components: a complete inability to control one’s drug use with progressively debilitating consequences; and an inability to recognize the reality of the situation or the destructiveness of this behaviour - what writers in the field describe as “denial”. And one of the dominant characteristics of this “illness” is the addict’s belief that he is not addicted.

117. An addict takes drugs to feel normal, or to cope with normal daily pressures, and s/he sees nothing abnormal about that. The constant ingestion of drugs is as necessary for an addict as insulin is for a diabetic; and it is because of this interplay between physiological and psychological pressures, that the condition is so difficult to “cure”. Control of addiction requires a degree of effort and commitment which many individuals are unable to muster. (Again see the comments in *Mitchell Island Forest Products Ltd.*, *supra*, at pages 81-84 and 89-93.)

118. Because the essence of drug addiction is an inability to control drug use, it is wrong to assign “fault” to an addict who uses drugs inappropriately. S/he cannot do otherwise. In this regard, an addict is in a different situation from “normal” employees who may act irresponsibly, but are not clinically addicted. Threats or consequences which are sufficient to deter normal individuals are much less likely to have the desired effect on an addict, whose freedom to choose is severely restricted by the addiction itself (although the threat of discipline may be *an element* in the equation). Thus, a “one track” “zero tolerance policy” that only involves discharge - and takes no account of disability - may not survive scrutiny under either a “just cause” test, or under the Ontario Human Rights Code.

119. However, it is precisely *because* ordinary sanctions may not work that, if someone is clinically addicted to drugs or alcohol, there must be positive assurance that s/he has recognized the condition and taken active steps to bring it under control. For although an employee cannot be discharged for addiction, per se, his/her consequent behaviour may have serious impact on himself/herself or others, and the risk of that behaviour can pose an identifiable hazard. In safety sensitive jobs, other employees (or the public) can be put at serious risk (hence the informant’s complaint in this case).

120. Of course, it is always difficult to distinguish irresponsible drinking or drug use from behaviour rooted in the “disease of addiction”. While addiction may be the cause of drug use on the job, so may many other things, including boredom, irresponsibility, lack of judgement, or an inclination to defy the rules. A person caught drinking or using drugs on the job is not necessarily addicted. Nor does the mere use of drugs at work establish addiction - especially in the case of cannabis, where the addictive properties are a matter of some debate.

121. However, even if the evidence does establish addiction - essentially a medical diagnosis - it does not mean that the addicted employee should be reinstated or that discharge is inappropriate. In fact, it probably means that traditional forms of deterrence are not enough to ensure compliance with workplace norms, and there must be additional positive indications that the individual has taken successful steps toward recovery. Drug addiction seems to be a particularly tenacious affliction, so where the individual is involved in a “safety sensitive” position, there must be affirmative evidence not only that the individual actually is “addicted”, but also that there are positive assurances that the employee has recognized it, that the employee has sought appropriate treatment, that the treatment is working, and that there is little risk of relapse.

122. So what is the evidence in the instant case?

123. The grievor has obviously been using marijuana for some time, and was caught doing so at work; moreover, if the grievor is to be believed, he smoked marijuana quite a bit in the late summer and in the fall of 1996. However, the grievor also testified that, except for two periods when he was under personal pressure, he was merely a recreational user of marijuana, and that his recent encounter with counselling had convinced him that *he was not drug dependent*.

124. Accordingly, assuming that someone *can* become addicted to cannabis, it is not so clear that the grievor is so addicted, or that he regards himself as an addict. What is clear is that the grievor continued to smoke marijuana for some months after his discharge, and for some period after he attended counselling sessions - which, in any event, were initially designed only to accomplish "controlled use", not abstinence.

125. There is no medical diagnosis of addiction, nor any medical prognosis of probable recovery. There is no detail about the grievor's "recovery program", other than the fact that he has attended a number of counselling sessions, and proposes to attend one counselling session a month for some period into the future. Indeed, there is no independent verification that the grievor has actually stopped using drugs, because the counsellor's letter merely records what the grievor himself has reported to her.

126. In short, if the grievor actually is addicted to drugs, the evidence does not establish that fact, and does not give one much confidence that he has come to grips with his situation. Nor does it disclose the degree of commitment evidenced in many of the reported cases. On the contrary, the situation is very similar to that faced by arbitrator Gorsky in *Stelpipe Page-Hersey Works and CAW*, (unreported, October 3, 1993 - noted in *Canadian Labour Views*):

No one able to medically assess whether the grievor's behaviour on March 6, 1993 could be attributed to his medical condition or as to his prognosis was called to testify on his behalf. In addition, while I do not wish to deprecate the grievor's sincerity, portions of his evidence can only be viewed as being self-serving ... The documentary evidence filed on behalf of the grievor lacks sufficient detail to give me the confidence to act on it alone. I am unable to accept the explanation for having no witness called on behalf of the grievor with expert qualifications, whose testimony might have tipped the balance in favour of returning him to work subject to conditions ... As noted above, there are also shortcomings in the documentary evidence submitted on behalf of the grievor which point in the direction of some of his assertions being self-serving. These relate to certain dates testified to by him, which are not supported by the documentary evidence, and the grievor's explanation for the discrepancies was not entirely satisfactory. There were also differences in some of the facts testified to by the grievor at the hearing as to when he ceased drinking alcohol and the recounting of the same facts in the documentary evidence ... In the circumstances, and in the absence of more substantial evidence about the grievor's condition and his potential for rehabilitation, I feel constrained about relying, to the extent that I would have to do, on the grievor's evidence as to his prognosis for maintaining sobriety and being able to carry out his obligations to his employer in a satisfactory manner, including his obligation to attend work.

I have the same reservations.

127. For the foregoing reasons, I am satisfied, that however the situation is analyzed, this grievance must be dismissed.

128. If the grievor is not *addicted* to marijuana, his misbehaviour provides just cause for discharge, and the mitigating circumstances are insufficient to warrant an exercise of the Board's remedial discretion under section 48(17) of the *Labour Relations Act*.

129. Alternatively, if the case is approached from the perspective of disease/disability and recovery, there is insufficient evidence to support a finding of "addiction", and only weak evidence of

the kind of recovery program which might support reinstatement (with conditions) to a “safety sensitive” position.

* * *

130. I do not wish to leave this matter, however, without one concluding observation.

131. In the course of argument, both counsel noted that: this is the construction industry, the Hydro collective agreement has a “hiring hall” clause, and that it is possible that, in response to Hydro’s call for more labourers, the union may refer the grievor to the site at some point in the future - as it has done periodically in the past. If that were to happen, the fact that the grievor was discharged in October 1996 may not be a complete answer to his job referral months or years later. The employer would have to exercise its judgement in a manner that is reasonable, having regard to the circumstances that obtain at that time - including any evidence that the grievor has abandoned his use of drugs.

132. The point is: discharge in the construction industry may not have the finality that it has in an industrial setting; and it is important to appreciate that nothing in this decision forecloses a future decision in the grievor’s favour based on evidence that is different from the evidence adduced before me.

133. With these additional observations, though, this grievance is dismissed.

0251-95-R International Brotherhood of Electrical Workers, Local 1687 (IBEW 1687), Applicant v. **Ontario Hydro**, Responding Party v. Power Workers’ Union, CUPE Local 1000 (“PWU”), International Brotherhood of Electrical Workers, Local 1788 (IBEW 1788), The Electrical Power Systems Construction Association (EPSCA), The Electrical Contractors Association of Ontario (ECAO), Intervenors v. Group of Employees, Objectors

Certification - Construction Industry - Evidence - Membership Evidence - Parties - Practice and Procedure - Representation Vote - IBEW Local 1687 applying to represent certain construction electricians employed by Ontario Hydro - Board earlier conducting pre-hearing representation vote and sealing box - Board concluding that PWU has no standing to participate further in proceeding as of right and that there is no reason to grant standing in exercise of Board’s discretion - Board not satisfied that membership evidence filed by PWU conferring sufficient representational authority to permit PWU to participate in IBEW application - Board not persuaded that PWU can be permitted to rely on its collective agreement with Ontario Hydro as basis for standing - Board finding no justification to give PWU amicus curiae status - Board also deciding against opening sealed ballot box and counting ballots - Board directing hearing with respect to remaining outstanding issues

BEFORE: *G. T. Surdykowski*, Vice-Chair.

APPEARANCES: *A. M. Minsky* and *Larry Lineham* for the applicant; *Bob Wright* for Ontario Hydro; *Richard P. Stephenson* for the Group of Objecting Employees; *Raj Anand*, *Kate Stephenson* and *Harry Tomsett* for IBEW Local 1788; *Brian D. Mulroney* for EPSCA; *Scott G. Thompson* for the ECAO; *C. Dassios* for Power Workers’ Union; *Mark J. Lewis* for LIUNA Local 183.

DECISION OF THE BOARD; July 31, 1997

1. Lest it be forgotten or overlooked, I find it appropriate to observe that this application for certification is but one manifestation of a struggle for bargaining rights for construction electricians employed by Ontario Hydro. In that respect, it is difficult to discern a difference between the PWU and the *de facto* IBEW 1788 (as opposed to the *de jure* IBEW 1788 which has been put in place from time to time by the IBEW International and which participated in the earlier phases of these proceedings). In many ways, this application is a continuation of the dispute between the *de facto* IBEW 1788 which has allied itself with the PWU, and the IBEW International, for which IBEW 1687 is very much a surrogate in this matter.

2. I also wish to reiterate that this application is governed by the *Labour Relations Act* which preceded the Act currently in effect; that is, by the Bill 40 Act, not by the Bill 7 Act (see paragraph 4 of the Board's February 27, 1997 decision reported at [1997] OLRB Rep. Jan./Feb. 82).

3. In the February 27, 1997 decision in this and three other applications for certification, the Board held that the PWU is not a trade union within the meaning of section 126 (of the current Act but which is identical to the provision in the Bill 40 Act) of the *Labour Relations Act* and that it was therefore not entitled to bring the applications for certification it had made in those other three applications (that is, in Board File Nos. 0164-95-R, 0186-95-R and 0187-95-R). The Board therefore dismissed those three applications.

4. This application remained to be dealt with. Accordingly, the Board directed the parties to make written representations setting out their positions with respect to how the application should proceed.

5. Upon reviewing the representations of the parties in response to that direction, I issued a decision dated April 23, 1997. Keeping in mind that the parties are entitled to an adjudicator with an open mind not an empty one, I tried in that decision to identify what appeared to me to be the issues which remain to be addressed, and to offer my preliminary thoughts in that respect. Nothing which I have written or said in that respect should have been or should be taken to suggest that I have made up my mind with respect to any of the remaining issues. I merely wanted to give the parties some indication of my thinking in that respect, in an effort to offer them some guidance with respect to the further written representations which I directed the parties to make. I also directed the Registrar to schedule a single day of hearing for the purpose of disposing of as many of the remaining issues as possible on the basis of the materials filed by them, to hear any additional representations the parties cared to make at the hearing, and to try to establish a protocol and schedule a hearing to deal with any issues which remained unresolved.

6. A hearing was convened in that respect on June 20, 1997. (I note that LIUNA Local 183 appeared at the hearing through counsel. It expressed an interest in the sector issue (see below) and did not otherwise seek to participate in this proceeding. The issue of its standing in the sector issue is appropriately dealt with if and when sector issue is dealt with.)

7. In the Board's April 23, 1997 decision and the parties' subsequent written representations, the following issues were identified:

- (1) Is the PWU entitled, or should it be allowed to participate further in this application? (IBEW 1788's standing is not in issue at this stage of the proceeding. It may be put in issue later in the proceedings.)
- (2) Should the representation vote held on July 7, 1995 be counted now?
- (3) Is the membership evidence filed by IBEW, 1687 in support of this application defective? In that respect, it is not suggested that the form of the membership evidence is deficient,

but rather that it was obtained as a result of misrepresentations made by representatives of IBEW 1687 and the IBEW International. In addition, it seems to me that the facts alleged by the group of objecting employees in that respect raises a question regarding whether the persons with respect to whom IBEW 1687 has filed membership evidence have in fact applied to be members in it, in as much as it is alleged that it was represented to the persons who signed the applications for membership in IBEW 1687 which are the membership evidence that doing so did not constitute an expression of a desire to become members of or be represented by IBEW 1687 without a further subsequent indication of such a desire.

- (4) Was there a collective agreement which covered the employees who are the subject of this application in effect at the time the application was made such that this application is untimely? This issue raises the question of the effect, if any, of a Letter of Understanding dated February 10, 1995 between Ontario Hydro and IBEW 1788.
- (5) Is the "petition" which has been filed by the group of objecting employees a voluntary expression of the wishes of the employees who signed it, and if so, what effect should it be given?
- (6) Was the work being performed by the bargaining unit employees at the material times in the electrical power systems sector or in the industrial, commercial and institutional sector of the construction industry?

8. At the hearing on June 20, 1997, I heard the parties with respect to the issues of the PWU's standing, whether the vote should be counted, and the order in which the other issues should be dealt with.

9. Having considered the written and oral representations of the parties, and subject to what is said below (see paragraph 34 below), I am satisfied that the PWU does not have standing to participate further in this proceeding as of right, and that there is no reason to grant it such standing in the exercise of the Board's discretion.

10. The PWU, supported by IBEW 1788 and the group of objecting employees, asserted two bases upon which it submitted it has or should be granted standing to continue to participate in this application:

- (a) the representational authorization it asserts it has from the employees in issue as demonstrated by membership evidence it has filed; and
- (b) its collective agreement with Ontario Hydro, the responding employer herein, may cover the employees who are the subject of this application, and may otherwise be affected by this proceeding.

Accordingly, argued the PWU, it has an interest in the application which is direct, substantial and legal, and as such is entitled or should be allowed to participate.

11. In the July 7, 1995 decision in *Canadian Union of Shinglers & Allied Workers*, (Board File No. 0014-95-R, unreported), the Board had this to say about an attempted intervention:

17. Dealing first with Local 30's intervention, a party which seeks to intervene in a proceeding before the Board must demonstrate a real discernible legal interest in the proceedings, or persuade the Board that it is able to provide the Board with assistance which is required to ensure that all of the issues are properly presented, such that it should be granted a kind of *amicus curiae* status. In representation proceedings, a trade union or organization of trade unions must generally establish that it is the bargaining agent for or otherwise represents at least some of the employees who may be affected by the application. *Amicus curiae* status, which is invoked as a matter of the Board's discretion, has rarely been granted. (*Kidd Creek Mines Ltd.*, [1984] OLRB Rep. Mar. 481, provides an example of when it was granted. In that case, the United Steelworkers of America was granted

amicus curiae intervenor status limited to making representations on the legal and policy issues raised by an application for certification by the International Brotherhood of Electrical Workers, Local 1687 for a bargaining unit of maintenance electricians, notwithstanding that the Steelworkers neither represented those employees nor sought to do so. Intervenor status was granted on the basis that the Steelworkers was the dominant trade union in the mining industry and represented many mine maintenance electricians within broader bargaining units. In another case, *New Dominion Stores*, [1986] OLRB Rep. Apr. 519, the United Steelworkers of America was denied such an intervenor status.)

18. In order to provide a basis for status, an interest must be direct and substantial. An interest which is merely political, which is anticipatory or speculative, or which is concerned with an indirect economic or commercial effect is not sufficient to entitle a party to intervene in a proceeding. Nor is the fact that a decision in a proceeding may be used or referred to as a precedent in another proceeding (*New Dominion Stores*, *supra*, at page 521; and, more generally, see *Re Schofield and Minister of Consumer and Commercial Affairs*, (1980) 28 O.R. (2d) 764 (Ontario Court of Appeal)).

19. To support an intervention on an *amicus curiae* basis, the Board must be persuaded that the parties seeking to intervene can provide it with real and substantial input on important issues which the Board is unlikely to receive from the direct parties, and that the participation of such an intervenor will not cause undue delay or prejudice the rights of a direct party.

20. In this case, Local 30 does not purport to represent any employee of any of the roofing contractors involved. The collective agreement between the Ontario Industrial Roofing Contractors' Association and the Built-Up Roofers', Damp & Waterproofers' Section of the Ontario Sheet Metal Workers' Conference, effective until April 30, 1995 will not be effected. Nor will any of its interests in the industrial, commercial and institutional sector of the construction industry since neither the Labourers' International Union of North America nor any of its Locals which are affiliated bargaining agents can represent sheet metal workers or roofers in the industrial, commercial and institutional sector. Nor was it apparent that Local 30's participation would provide the Board with relevant input which the applicants, the CUSAW or their RRCA would not. In that respect, whether the Labourers' International Union of North America or its Locals can represent workers engaged in roofing in the residential sector is not in issue before the Board in this case. Although the Labourers' union may be present in this application in spirit, it is not here as a party and does not seek to represent any such employees in this application. In the result, I was not persuaded that Local 30 has any direct or substantial or legal interest in this application such that it is entitled to participate in this proceeding. Nor was I satisfied that there was any other cogent reason to permit Local 30 to participate in the exercise of the Board's discretion.

Further, in *Domtar Inc.*, [1992] OLRB Rep. Nov. 1184, the Board noted that:

13. A trade union which seeks to intervene in another party's application for certification must establish that it either represents or is the bargaining agent for at least one employee in the bargaining unit which is the subject of that application. However, as the Board observed as long ago as *Napev Construction Limited*, [1976] OLRB Rep. Mar. 109, a trade union seeking to intervene in another party's application must either be the *present* bargaining agent or hold *representational authorization* from one or more persons in the bargaining unit. Evidence of representational authorization upon which a trade union seeking intervenor status seeks to rely may be filed subsequent to the terminal date fixed for the application for certification in question. Indeed, it has been the Board's practice to accept such evidence as late as the hearing at which the issue of the right to intervene is dealt with (see for example, *Chukini Lumber Company Limited*, [1970] OLRB Rep. Apr. 63; *Runnymede Development Corporation Limited*, [1987] OLRB Rep. Oct. 1306; *Les Ingenieries Consbec Inc.*, [1976] OLRB Rep. Nov. 1402).

[emphasis supplied]

12. In effect, the PWU submitted that it both had representational authorization from, and was the bargaining agent for, employees in the bargaining unit herein.

13. In my February 27, 1997 decision, *supra*, I wrote that in its application in Board File No. 0187-95-R the PWU sought to displace IBEW 1788 as the bargaining agent for Ontario Hydro employees covered by the "Transmission Agreement" between Ontario Hydro and Local 1788. Of course, it is the EPSCA and not Ontario Hydro which is the employer party to the Transmission Agreement, although section 2 of the collective agreement relevant to these proceedings provides that it applies to "... all construction industry work performed on transmission systems for Ontario Hydro on Ontario Hydro property ... in ... Ontario...", and Ontario Hydro is the responding employer in all of these applications. In any case, it was a displacement application. Further, I observed that the PWU's application in Board File No. 0164-95-R appeared to be both in the alternative to its own applications in Board File No. 0186-95-R and, more particularly, Board File No. 0187-95-R, and also a pre-emptive response to IBEW 1687's application herein. The connection between the PWU's applications in Board File No. 0187-95-R and 0164-95-R is apparent on the face of the two applications, and is demonstrated by the PWU's stated intention to rely on the eight pieces of membership evidence which it filed in support of its application in Board File No. 0164-95-R and in Board File No. 0187-95-R as well, and by its pleadings in support of its application in Board File No. 0164-95-R that:

It is the position of the applicant that this bargaining unit, at least as it relates to the site where work is currently being done, is part of a much larger bargaining unit covered by a province-wide agreement between the IBEW Local 1788 and Ontario Hydro. The applicant's initial position is that a bargaining unit such as the one sought in this application is not appropriate. However, another Certification Application is currently being filed by another Union in respect of these employees and the applicant is therefore filing this Certification Application in the alternative to its position, should the Ontario Labour Relations Board determine that the Unit is appropriate.

14. Similarly, in its intervention in this application the PWU pleaded as follows:

The Intervenor understands that a Certification Application is being filed by the International Brotherhood of Electrical Workers and/or its Local 1687.

The employees in respect of which this Application is being made are members of the Intervenor.

The bargaining unit being sought by the Applicant in this matter is inappropriate as it forms part of a much larger province-wide bargaining unit in respect of the electrical power systems construction sector covered by the Collective Agreement enclosed with this Intervention. Alternatively, if the bargaining unit sought does not form part of the province-wide IBEW bargaining unit, the Application is untimely as the enclosed Letter of Understanding would constitute a Collective Agreement and a period of one year has not passed since its signature.

In the further alternative, if this Application is allowed to proceed, the Power Workers' Union, CUPE Local 1000 should be listed as a Union on the ballot in the vote. This Intervenor has filed a Certification Application in respect of the employees at issue here.

Also in support of its intervention in this application, the PWU has submitted a copy of the Transmission Agreement, (the collective agreement referred to in its intervention) a copy of what has been referred to in these proceedings as the Leigh's Bay Agreement (the Letter of Understanding between Ontario Hydro and IBEW 1788), and referred to the membership evidence it has filed in support of its application in Board File No. 0164-95-R.

15. I am not satisfied that any union which is able to file membership evidence with respect to at least one employee who is affected by an application for certification has, *on that basis alone*, sufficient representational authorization to *entitle* it to participate in an application for certification by another trade union.

16. Employees affected by an application for certification have a right to participate in proceedings before the Board in that respect. They may do so directly with or without counsel (or other

competent representation), or through a trade union other than the one seeking certification, or through some other organization, and which other union or organization may provide counsel or other representation. It is fair to observe that there is no shortage of previous cases in which the Board appears to have proceeded on the assumption that in circumstances where there was nothing to suggest otherwise, the sort of membership evidence on which the PWU relies in this case constituted an implicit representational authorization for purposes of conferring standing to participate in an application for certification by another trade union.

17. Where a trade union has made its own application for certification with respect to a particular bargaining unit of employees, it probably has a right to participate in another trade union's application for certification which affects at least some of the same employees (although it is more likely that the Board would make a determination under what is now section 111(3) of the Act - section 105(3) of the Bill 40 Act). However, it is not at all obvious that the mere fact that one or more affected employees happen to be members of a trade union necessarily gives that trade union representational authority to participate in another trade union's application for certification in circumstances where the trade union seeking to participate is otherwise a stranger to the proceeding and does not otherwise have an representational authority in the workplace. Take, for example, an application for certification for a bargaining unit of (non-ICI) construction employees. If the application is by a Local of the United Brotherhood of Carpenters and Joiners of America but one of the employees affected happens to be a member of the Labourers' International Union of North America (a not altogether rare circumstance in the Board's experience), does this happenstance automatically entitle the Labourers' Union to participate in the application by the Carpenters' Union? Or what if one of the affected employees happens to be a member of the CAW-Canada, for example? Is the CAW-Canada entitled to standing? I think not, at least not on that basis alone.

18. It becomes easier to understand why this is the case if one begins by returning to first principles. By its very nature, the most that any authority obtained by a trade union which holds no bargaining rights which are or might be affected by an application for certification affected confers just that, an authority to represent employees who have given the authorization and not some sort of independent right to participate. Such a trade union's ability to participate in another trade union's application for certification is rooted in and entirely dependent on it.

19. Whether a trade union has obtained appropriate representational authorization to permit it to participate will depend on the circumstances. The mere fact that an affected employee is or has applied to become a member of a trade union or other organization does not by itself confer sufficient representational authorization in that respect, unless a consequence of being or applying to be a member carries such an authorization with it. Trade unions exist to organize and represent employees in employment-related dealings with their employer. The purpose of typical such membership evidence is to support an attempt by a trade union to secure such bargaining rights, generally through the certification procedures under the Act, but sometimes through voluntary recognition. That is the representational authorization which is conferred by typical membership evidence. It is not about, and does not by itself confer, a representational authorization with respect to employees' dealing with other trade unions, whether in an application for certification by another trade union or otherwise.

20. The PWU's claim to representational authorization to participate in IBEW 1687's application is based on the membership evidence it obtained and filed to support its own applications for certification in Board File Nos. 0164-95-R and 0187-95-R. *Prima facie*, insofar as that was the intended purpose of that membership evidence, the usefulness of the PWU's membership evidence in these proceedings was exhausted when its applications were dismissed.

21. Further, the PWU's membership evidence is in the following form:

APPLICATION FOR MEMBERSHIP IN POWER WORKERS' UNION

I the undersigned:

- a. Apply for membership in the above union and agree to abide by its constitution and by-laws:
- b. Authorize the union to be my exclusive bargaining agent.

Signed (X) _____

On behalf of the above mentioned Union. I hereby accept this application.

Signed _____ on behalf of the Union.

Date _____

22. This "Application for Membership" is not in the form contemplated by the PWU constitution filed in these proceedings. In that respect, Article 1 provides that "Member":

shall mean an employee who has signed an application for membership in the Union in the form appearing in Schedule 1 to this Constitution and whose application has been accepted by the Executive Committee.

Article IV(1) provides that:

All employees of the Hydro [sic] who sign an application for membership in the form appearing in Schedule 1 to this Constitution shall be eligible for and shall be admitted to membership in the Union subject to acceptance by the Executive Committee. If membership is withheld by the Executive Committee, such withholding shall be subject to approval by the Executive Board.

The Form in Schedule 1 is as follows:

Dues Authorization and Application for Membership

I, the undersigned employee of [insert name of employer], hereby authorize and direct [insert name of employer] to deduct from my wages or salary an amount equal to the current weekly dues of the Union, on a weekly basis, and to pay the same as my dues to the Financial Officer, Power Workers' Union, C.U.P.E. Local 1000 - C.L.C.

I hereby apply for membership in the Power Workers' Union, Canadian Union of Public Employees Local 1000 - C.L.C. and agree to conform to and be bound by the Constitution of the Union. I desire to have the Power Workers' Union, C.U.P.E. - C.L.C., act as Bargaining Agent for me.

Name: _____ Empl. No: _____

Signature: _____ P.R. No.: _____

Witness: _____ W.R.G.: _____

Social Ins. No.: _____ Date: _____

In addition, Article XXXII 3.11 provides that:

Any person who was a member in good standing of Local 1788 on March 1, 1995 (including those persons holding valid Withdrawal Cards on that date) shall be entitled to membership in the Union upon application. Such membership shall not require the payment of any initiation fees or other assessments to the Union.

23. Assuming that the application for membership forms upon which the PWU relies are “valid” under its Constitution (which form would otherwise clearly be sufficient to constitute membership evidence for the Board’s purposes in an application for certification by the PWU) all that any employee signing such a document has done is apply for membership in, agreed to pay dues to and be bound by the constitution and by-laws of the PWU, and authorized it to be his/her exclusive bargaining agent. The latter is something which can only be given effect if the PWU obtains bargaining rights, and refers to collective bargaining and dealings on employment matters with an employer. There is nothing on the face of this membership evidence which authorizes the PWU to represent the employees in this application by IBEW 1687, or in any other dealings with another trade union. Further, there is nothing in either the PWU’s constitution or by-laws which have been filed with the Board in the course of the proceeding which supports its assertion that the membership evidence it has filed confers sufficient representational authority to permit the PWU to participate in this application.

24. Even if the PWU’s membership evidence could clothe it with a sufficient representational authorization for purposes of this application by IBEW 1687, 5 out of the 8 employees affected constitute the group of objecting employees which is participating directly as a separate party, with counsel.

25. Employees are entitled to participate in certification proceedings which directly affect their rights under the *Labour Relations Act, 1995*. However, this cannot mean that every individual employee will necessarily have the right to participate separately. Whether or not employees are entitled or should be permitted to participate separately will depend on the circumstances.

26. In most cases, affected employees will fall within one of two categories: those who support the application for certification and those who oppose it. Generally, it is not appropriate that employees who support the application be allowed to participate in the proceedings, either individually or in a group to give voice to that support. Their support is demonstrated through the membership evidence filed by the applicant trade union and, under the current act, through the representation vote, and their interest in any other aspect or issue in the proceedings is coincident with and appropriately represented by the applicant trade union. Similarly, employees who oppose an application for certification and who wish to appear before the board in that respect are not necessarily entitled to participate in the proceeding separately, either as individuals or in more than one group. Employees who oppose an application for certification may have different levels of interests in particular issues in an application for certification. But they are united in interest in the primary issue: namely, whether the applicant trade union is entitled to be certified. That being the case, it is generally appropriate to require that “objecting employees” speak with one voice; that is, that they participate in one group as a single party (in a way which is somewhat analogous in civil proceedings in certain circumstances, for example).

27. I hasten to add that this will not always be the case. The nature of the positions which employees wish to take, or the issues with respect to which they wish to participate may entitle them or make it appropriate to permit them to participate in a configuration other than a single entity. This may be a result required by law, or it may be a matter of hearing management. In that latter respect, it would benefit no one if a hearing became difficult to manage because a number of employees with substantially the same interests decided for some reason that they wished to participate individually or in several groups.

28. The right to participate and be heard does not necessarily translate into an individual and separate right to be heard regardless of the circumstances. Employees cannot be part of two or more separate parties which are allied in interest in the same proceeding before the Board, or if they can, they are not entitled to be represented more than once. Having organized themselves into a group, which has filed a “petition” and indicated a desire to participate in this proceeding in order to oppose the

application, and having retained counsel in that respect, the group of objecting employees has repudiated any representational authorization which might be suggested by the PWU's membership evidence.

29. With respect to the three employees who are not part of the group of objecting employees, there is no suggestion that they have an interest which is incompatible with or even different from that of the five employees who constitute the group of objecting employees. Indeed, while they have not signed the petition which has defined the group of objecting employees to date, it is apparent that these three employees are part of the group of objecting employees in spirit and for all practical purposes they are allied in opposition to the application. Further, there was no reason suggested for allowing them to participate as a separate party. Accordingly, even if the membership evidence filed by the PWU with respect to its own applications for certification also represents a sufficient representational authority for purposes of this proceeding, the eight employees must decide whether they want to be represented by the PWU in this proceeding, or participate as the group of objecting employees as such. They cannot do both. They can be represented once, not twice.

30. As to the second basis for the PWU's claim to standing, I am not persuaded that the PWU can be permitted to rely on its collective agreement with Ontario Hydro as a basis for standing to participate in this application, or to assert that that collective agreement covers the employees affected by this application and therefore constitutes a bar.

31. The first time that this position was asserted was in the PWU's June 13, 1997 letter to the Board, more than three years after this and the PWU's own applications for certification were made. Not only was there no hint of this earlier, but the very fact that the PWU obtained the membership evidence which forms the basis for its "representational authorization" position, and that it made not one but two applications for certification with respect to the employees who are the subject of this application is completely inconsistent with such an assertion. Indeed, in its pleadings and throughout the various proceedings in this and the PWU's three applications for certification, the PWU has consistently asserted that the employees were covered by either the Transmission Agreement (which was in an "open period" and therefore the PWU's application to displace IBEW Local 1788 as bargaining agent was timely) or by the Leigh's Bay Letter of Understanding as a separate collective agreement (in which case the PWU's own application Board File No. 0164-95-R would have been untimely). Further, it is no secret that for many years the PWU has represented Ontario Hydro employees who have regularly performed a substantial amount of electrical construction work under its collective agreement with Ontario Hydro. Indeed, once the Board determined that the PWU had to establish that it is a "trade union" within the meaning of section 126 of the Act in order to be able to bring its three applications for certification, the fact that it has represented employees who have performed construction work under the PWU's collective agreement with Hydro was the very basis for the PWU's assertion that it was a construction trade union; that is, a "trade union" within the meaning of section 126. The litigation of that issue consumed many days of hearing spaced over approximately one year, and at no time until many months after the hearing concluded and the Board decision issued did the PWU assert that its collective agreement with Ontario Hydro covered any of the affected employees, and in particular the employees employed on the Leigh's Bay project. Accordingly, the PWU cannot be heard to make that assertion now.

32. Even if I were persuaded that it was appropriate to allow the PWU to maintain such an assertion at this late stage, I would be constrained to conclude that, having failed to assert any bargaining rights either on the Leigh's Bay project itself or in these proceedings, the PWU has abandoned any bargaining rights it might arguable have had in that respect. Although abandonment was not specifically raised at the June 20, 1997 hearing, the pertinent facts are found in the PWU's own applications and pleadings, and are incontrovertible.

33. Finally, I am not persuaded that the PWU could bring anything to the remainder of this proceeding which would justify giving it an *amicus curiae* status in the exercise of the Board's discretion.

34. In the result, I am not persuaded that the PWU has or should be granted standing to participate further in this application. However, if the employees affected by the application, which includes the five employees who constitute the group of objecting employees and the three who are not part of that group, elect to have the PWU represent them as a single party, the PWU will be allowed to participate as their representative. The employees will have 14 days to make their election in that respect, and to advise the Board in writing of their decision, failing which they will be deemed *not* to have selected the PWU as their representative in this proceeding and the matter will proceed without it.

35. I now turn to the question of whether the representation vote should be counted.

36. My initial inclination was to count the ballots. However, I have concluded that there would be no value in doing so.

37. In its decision dated June 28, 1995 in which the Board directed that a pre-hearing representation vote be taken (even though the applicant did not request such a vote) in the voting constituency agreed to between the parties, the Stamp panel directed that voters be asked to indicate whether they wished to be represented by the PWU or IBEW 1687 in their employment relations with Ontario Hydro. The form of the ballot used in the vote reflects the Board's decision in that respect. Accordingly, voters were given a single ballot which gave them a choice between the PWU and IBEW 1687. IBEW 1788 did not appear on the ballot and voters were not given a "no union" option.

38. What then is the value of such a ballot, in circumstances in which the PWU's applications for certification have been dismissed on the basis that it is not a "trade union" within the meaning of section 126 of the Act and therefore cannot apply for certification under the construction industry provisions of the Act? I am not satisfied that it has any value. As a result of the Board's February 27, 1997 decision, the choice which the form of ballot used in the vote gave to employees was not one which was open to them to make. The voting constituency agreed to by the parties and used in the vote does not contemplate the possibility that the Transmission Agreement covered the employees affected by this application. (Indeed, no one has suggested that this is a possible result, presumably because if that is the case, the application is timely but it is likely that IBEW 1687 filed insufficient membership evidence to even entitle it to a representation vote. However, if a vote was directed, the employees would in those circumstances be given a choice between IBEW 1687 and IBEW 1788.) But one possible result which the Board decision and ballot did not contemplate is that of a representation vote offering employees the choice of IBEW 1687 or no union is appropriate. This would be the case if the petition relied upon by the group of objecting employees is found to be voluntary, but all other issues which stand in the way of Local 1687's application are determined in its favour. The form of the ballots used in the vote held on July 7, 1995 does not reflect this choice. It is one thing to offer employees a choice between two unions and quite another to offer them a choice between one or more unions and no union. On one hand, an employee may favour one union or another but would prefer to have either union rather than none at all. On the other hand, an employee may not want to be represented by any trade union, but if that is not an option would prefer to be represented by one union rather than the other. It is not apparent that a vote in which voters were asked to choose between the PWU and IBEW 1687 gives any indication of the employees' wishes with respect to a choice between Local 1687 and no union.

39. Further, IBEW 1687 did not ask for a representation vote at all. It continues to assert that it is entitled to be certified without a vote, as indeed it is if all of the remaining issues are determined in its favour (since the "vote in every case" provisions of Bill 7 do not apply to this application: see

paragraph 4 of the February 27, 1997 decision). In addition, it is apparent that whatever might be gleaned from the results of the vote which has been taken, all of the matters which are in issue will remain in issue, and the litigation of this application will continue. If it could be discerned that IBEW 1687 won the vote, the parties opposed to the application would continue to assert that the application is untimely and that IBEW 1687's membership evidence is defective, and that in either case the application should therefore be dismissed. On the other hand, if it could be discerned that IBEW 1687 lost the vote, it would continue to assert that it is entitled to certification without a vote and all of the issues, including the timeliness of the application, the adequacy or sufficiency of IBEW 1687's membership evidence, and the voluntariness of the petition would still have to be litigated. In other words, no result which could possibly be discerned from the vote which has been held would be dispositive of this application or any significant part of it.

40. Accordingly, I am not satisfied that there is any purpose to be served by counting the ballots cast in the July 7, 1995 representation vote herein now, or perhaps ever. The ballot box will therefore remain sealed.

41. Having regard to the representations of the parties, I find it appropriate to direct that the remaining issues be dealt with in the following order:

- (a) the status of the Leigh's Bay Letter of Understanding; that is, whether it constitutes a collective agreement which bars this application;
- (b) the adequacy and sufficiency of IBEW 1687's membership evidence and the voluntariness of the petition;
- (c) the sector issue.

42. In that respect, the Leigh's Bay Letter of Understanding issue is a severable one which may lead to a further reduction of the parties if it is determined in favour of IBEW 1687, although if it is determined against IBEW 1687 it will make it necessary to determine the sector issue, unless the membership evidence issue is also determined against IBEW 1687.

43. Whatever the determination of the Leigh's Bay Letter of Understanding issue, the membership evidence issue will have to be addressed. This issue appears to be so intertwined with a petition issue that it makes no sense to try to separate the two, and it is appropriate to deal with them together.

44. Finally, the sector issue is both severable and whether it needs to be addressed at all depends upon the determination of the other issues. In addition, the nature of sector disputes is such that the proceedings tend to be cumbersome and lengthy (even relative to this one). Accordingly, it is appropriate to leave it to the end, and to address it only if a determination of the sector issue is necessary to the disposition of this application.

45. The Registrar is directed to schedule a hearing for purposes of hearing the evidence and representations of the parties with respect to the Leigh's Bay Letter of Understanding issue; namely, whether this constitutes a collective agreement which bars this application. Hearing dates are to be scheduled in consultation with the parties, such consultation to take place after the affected employees who wish to participate in this application elect or are deemed to have elected, representation by either the PWU or the group of objecting employees. In the event that the parties are unable to agree to hearing dates within a reasonable period of time, I am prepared to set preemptory dates.

0062-97-U; 0367-97-U National Automobile, Aerospace and Agricultural Implement Workers Union of Canada (CAW-Canada), Local 124, Applicant v. Circuit World Corporation, operating as **PC World**, Responding Party

Duty to Bargain in Good Faith - Remedies - Strike - Unfair Labour Practice - Employer's proposal made in January for new collective agreement rejected and employees striking - Union and employees purporting to accept proposal in March - Board satisfied that January proposal had been extinguished by passage of time and in context of long strike - Board finding that employer's rejection of union's repeated overtures to return to bargaining violating its duty to bargain - Board also finding that employer's April proposal for a new collective agreement was designed to invite rejection and was in breach of the Act - Application allowed - Parties directed to return to bargaining forthwith to bargain in good faith and to make every reasonable effort to reach a collective agreement

BEFORE: *Gail Misra*, Vice-Chair.

APPEARANCES: *Eric del Junco, Marilyn Lesperance* and *John Ali* for the applicant; *S. McArthur* and *Steve Aiken* for the responding party.

DECISION OF THE BOARD; July 11, 1997

1. The matters complained of in these applications arise out of the same set of negotiations for a new collective agreement, and a strike which commenced on January 9, 1997. The two files were therefore heard together.

2. The applicant (the "union" or "Local 124") claimed that the responding party (the "employer" or "PC World") had engaged in bad faith bargaining, and requested a number of remedies for the alleged breach. PC World denied it had breached the Act, and was seeking the dismissal of these applications.

3. On July 4, 1997, following seven days of hearing, the Board issued a bottom-line decision with respect to both applications, wherein the Board found and directed as follows:

- a) that the January 8, 1997 proposal made by the responding party has been extinguished by the passage of time and in the context of a long strike;
- b) that the responding party has breached its obligation to bargain in good faith and to make every reasonable effort to reach a collective agreement;
- c) that taken as a whole, the responding party's proposal of April 18, 1997, appears to have been designed to invite rejection by the applicant and its members, and is therefore a breach of section 17 of the Act; and,
- d) the parties are directed to return to bargaining forthwith to bargain in good faith and to make every reasonable effort to reach a collective agreement.

These are the Board's reasons for that decision.

4. Prior to the commencement of the hearing the parties argued about who had the onus in these applications, and which party should lead its evidence first. Having heard the submissions of the parties, the Board ruled orally that the union should proceed first with its evidence, and that the Board would reserve until the end of the case the decision with respect to who bears the ultimate onus. As will

become clear, it is unnecessary to address the issue in this case, and the Board therefore declines to rule on this issue.

5. PC World is a manufacturer of circuit boards and complex bare boards for insertion into electronic equipment like satellites, computers, communication devices and cellular telephones. It operates in a highly competitive field, which five years ago had about five or six thousand manufacturers, but today only has about 1000 manufacturers left. The manufacture of circuit boards requires that the ultimate product goes through a sequence of between 25 and 60 different processes before being ready to ship. Each process can compromise the yield and effect later processes. Hence, the company has to diligently manage quality and work in process. The manufacture of circuit boards involves a high degree of operating sophistication and is subject to frequent design changes. PC World therefore has to manufacture a large number of its products in short runs and for tight delivery times. It also prepares prototype boards for its customers' engineering departments, which must be done on a 24-hour to 5-day turnaround. Most of the products it manufactures for its customers are only made for about one year before the design specifications change to meet consumer demands and changing technology.

6. Local 124 is the certified bargaining agent for the approximately 103 employees of the employer in its Scarborough plant. In 1993 the parties entered into their first collective agreement. In 1995 that agreement was extended for a one-year period, and expired on December 8, 1996. During that one year extension, the employer and the bargaining unit, without the participation of the CAW-Canada National Representative or the Local President, agreed to a matrix system (explained in more detail later), which defined functional skill development in all of the main work areas of the plant. The union gave notice to bargain for a new collective agreement on October 1, 1996, and as is usual for this union, applied for conciliation on November 21, 1996, prior to the commencement of bargaining. A conciliation officer was appointed on December 4, 1996.

7. The union bargaining committee was comprised of Marilynne Lesperance, the National Representative for the CAW-Canada; John Ali, the President of Local 124, but not an employee of the responding party; and bargaining unit members Bobby Ramnath, Jude Wenaden, Perry Nalamuth, and Raj Jain from PC World. The employer bargaining committee was made up of Philip Wolfenden, counsel to the employer; Steve Aiken, Director of Human Resources; and Wayne Haskins, Production Manager. Ms. Lesperance and Mr. Wolfenden were the spokespeople for their respective committees. Ms. Lesperance had become responsible for this bargaining unit in November 1996 when she had to take over from the previous National Representative, Susan Spratt. She was therefore not very familiar with the membership at the time she had to begin negotiating in this round of bargaining. Nonetheless, Ms. Lesperance is an experienced staff representative who has negotiated over 300 collective agreements in her career.

8. The parties met on December 4, 1996, at which time the union tabled its proposals orally. On the following day the union gave its proposal in writing, and the employer responded with its proposals. The union bargaining committee was aware that PC World was in financial trouble, and had been under bankruptcy protection since April 1995. It appears that PC World used to be a leader in the manufacture of circuit boards, but had begun to coast about five years ago. As other manufacturers became more competitive PC World began to lose clients approximately three years ago. In March 1995 the responding party applied for protection from its creditors under the *Bankruptcy and Insolvency Act*. That protection was due to expire in April 1997. By December 1996 PC World knew that its bank was no longer prepared to support it, and it was therefore searching for alternate financing. At every meeting for negotiations the employer informed the union of its dire financial situation and that it was seeking refinancing. During negotiations the employer offered to show to Ms. Lesperance the books or documents showing the responding party's financial status. It was attempting to avoid any labour disruption as it wanted the company to be stable as it was seeking new investors.

9. The employer objectives in December 1996 were to keep the business running, to ensure a steady cash flow, and to maintain labour peace and stability to get its finances in order. By late December PC World had a new investor group in place to replace its bank financing, but it was not until December 31, 1996, when a payroll crisis was looming, that the financing finally came through.

10. Mr. Aiken, the Director of Human Resources for PC World, was not happy with what the employer was agreeing to in bargaining with the union. It was his view that PC World was agreeing to language which would be difficult to administer and which would hamper the organizational changes which the employer needed to make to become more competitive and efficient. He was concerned that there were huge disparities in the wages of employees doing the same work. He was also concerned about the mechanics of dealing with union issues, and how much time was required to attend union related meetings. In a period when he believed the market for PC World's product was picking up, he was concerned the employer would suffer from a "slow strangulation" as a result of the agreement it was reaching. However, the employer bargaining committee felt that PC World was at a low point in terms of its insecurity, and it was prepared to pay a premium and agree to language to avoid instability on the labour front.

11. The parties met and negotiated on December 10, 11, 13, 16, and on December 20 they reached a memorandum of agreement (the "memorandum"). The union bargaining committee was confident that the membership would ratify the memorandum. However, on December 21, 1996, 88% of the union membership rejected the tentative agreement. The employees voted 89% in favour of strike action and informed the union negotiating committee of what they wanted to see in a settlement if a strike was to be avoided. The employer was informed of the results of the ratification meeting. On December 23 the Ministry of Labour issued a "no board" report, but, due to the Christmas holidays, it was not received by the union until January 6, 1997.

12. On January 7, 1997, when the plant reopened after the Christmas shutdown (December 22 to January 6), the union informed the employer that a strike would commence on January 9, 1997. The parties met on January 8 to bargain for a last time to attempt to reach a collective agreement in light of the employees' rejection of the last tentative agreement.

13. Following rejection of the memorandum on December 21, 1996, the three issues of major concern to the membership were for a percentage wage increase for all members, a greater increase in wage rates, and abolition of the matrix system.

14. The matrix system became a significant bone of contention during the negotiations. As noted earlier, it had been agreed to by the bargaining unit members without the knowledge of the CAW-Canada National Representative or the Local 124 President. The matrix system allowed the employer to fill rush orders efficiently by moving people around to complete various tasks, without any concern about posting positions, or about seniority. Use of the system permitted the employer to simply consider who could do a particular job, and to transfer that person for the duration of the job. Employees who may only have one skill area would be unlikely to get transfers, and, in the event of a layoff, would be more vulnerable to being laid off because of their relative lack of flexibility. Under the matrix system, the employer had no obligation to train people in more skill areas. By the time of negotiations in December 1996, the employees were no longer happy with the matrix system, and wanted it to be changed so that senior employees who were not multi-skilled would have some protection against being laid off. Hence, the union attempted to bargain Article 8.02 of the collective agreement, which related to layoff and recall. In the memorandum the parties had worked out a training scheme so as to allow more employees to become multi-skilled. After December 21, the bargaining unit members clearly told the union bargaining committee they did not want the matrix system, even with a training regime, any longer.

15. When the parties met to negotiate for the last time before the strike deadline on January 8, 1997, these issues were on the agenda. The union presented a list of 11 items which the membership had indicated it wanted. None of the items were new, but rather were items which the union and employer had negotiated about in December and either agreed upon or the union had withdrawn or compromised on. The membership had however wished these items to be renegotiated. By 1:30 p.m. the employer had agreed to all but three of the items. PC World did not agree to a shift premium proposal, abolition of the matrix (although, due to the lack of time before the strike deadline, it was prepared to discuss this issue after the collective agreement was reached), and a higher wage proposal made by the union. According to Mr. Aiken, the employer still wanted to avoid a strike because some of its investors wanted to be assured of two or three years of labour peace. He conceded however that once PC World had the financing in place in late December 1996, it was in a less precarious position than when it had negotiated the December 20, 1996 memorandum.

16. The union came back with its counter-proposal at 4:30 p.m. While Ms. Lesperance believed the union should accept the employer's proposal, including a wage increase of 30 cents per hour in each of two years, the employee members of the bargaining committee believed there was an extra 5 cents which the employer would give them. Mr. Ali and Ms. Lesperance did not believe the company had any more money to give, but the committee would not go back to the membership with the employer's last offer. The basis of the employees' belief was that after the 1:30 p.m. meeting between the committees, Mr. Haskins had asked to speak directly to the bargaining unit members on the union committee. The union did not agree, so Mr. Haskins spoke to the whole committee. There is a difference in the evidence of Messrs. Aiken and Haskins on what transpired at this juncture.

17. According to Mr. Aiken, Mr. Haskins wished to speak to the union bargaining unit members alone because he has been with the employer a long time and has a relationship with the workers. He wished to speak "from his own heart" to the workers on the union's bargaining committee because he was concerned that the bargaining process was not leading to resolution at that point. Messrs. Aiken and Wolfenden allowed Mr. Haskins to speak to the union committee. According to Mr. Aiken, he and Mr. Wolfenden left the room and were not present for the discussion, so that he claimed he did not know what was said. He said he did not believe that Mr. Haskins had at that time told the union committee that there was a little more money still on the table. He did think Mr. Haskins may have given bargaining unit members that impression later when they met with Mr. Haskins in the hall a number of times later in the afternoon. He also indicated that in these hall meetings there had been some discussion between the bargaining unit members and Mr. Haskins about splitting the difference between the employer wage position and the union's wage position, which were 30 cents and 50 cents respectively. When Mr. Wolfenden heard about what Mr. Haskins had told the union committee members, he was upset, and told the union bargaining committee that the employer offer was final, and that there was no more to offer. Mr. Aiken conceded in his evidence that had there been some movement on some other monetary issues, there may have been extra money available for wage increases, but he reiterated that the employer had reached its total monetary maximum at that stage.

18. According to Mr. Haskins, in the mid to late afternoon of January 8th, when Mr. Wolfenden had left to attend another meeting, Mr. Haskins and Mr. Aiken met with the union bargaining committee. He made a plea for reason. He said to the committee that there was nothing more to give on uniforms or safety shoes. He then said he was sure that Steve (Mr. Aiken) would kick him under the table for what he was about to say, but that there may be some more money. The union bargaining committee thanked Mr. Haskins, and began to caucus. Thereafter, during the afternoon when each committee was in its own caucus room, bargaining unit members from the union committee went to speak to Mr. Haskins on a number of occasions to discuss what money they believed the employer may still have available to give to them as a wage increase. In one of those visits Mr. Haskins and two bargaining unit members talked about splitting the difference between what the union wanted and what the employer

had tabled in its last offer. At that point the union members told Mr. Haskins that the union was prepared to take 40 cents, and the employer had been offering 30 cents. Hence, splitting the difference would amount to the employer going to 35 cents. Mr. Haskins offered to call Mr. Roseborough, the President of PC World, to see if there would be any more money offered. He returned to the room and spoke to Mr. Aiken, who was not happy about what Mr. Haskins had been saying to the union side. Mr. Haskins called Mr. Roseborough and was told there was no more money available. Mr. Wolfenden had left the hotel for the afternoon to attend another meeting, so that he was gone from about 3 p.m. to 5:30 p.m. when all of these discussions took place.

19. Having considered both Messrs. Aiken's and Haskins' versions of the events of that afternoon, the Board finds Mr. Haskins' account to be more likely to reflect what transpired. Mr. Haskins was the main player in the events, and his recollection was relatively clear on the sequence of events. Also, he did not attempt to hide what he had said, even though it bolsters the union's contention all along that the union had been led to believe that there was an extra 5 cents which may be available for an increase in wages. It is unclear to the Board why Mr. Aiken did not recall or tell the Board that he had been present at the meeting with the union when Mr. Haskins had first told the union clearly that there may be more money available for wages.

20. At around 6:30 p.m. on January 8 the committees met for the last time prior to the commencement of the strike. At that time Mr. Wolfenden informed the union that the company had made its last offer and had nothing more to offer. There is controversy about what was said at this juncture with respect to the employer withdrawing this final offer if the union commenced a strike, and I will deal with this issue below. The union committee started to shut their respective books and binders, and began to leave. The employer committee remained behind at the hotel where the meeting had taken place and discussed what would happen next. They called Gordon Roseborough to inform him that talks had broken down, and that a strike would begin at midnight. Messrs. Haskins and Aiken then returned to the plant.

21. PC World contended that twice on January 8, 1997, Mr. Wolfenden informed the union that if it did not accept the final offer, once a strike commenced, the offer would be withdrawn. Mr. Aiken testified that at 1:30 p.m. and at 6:30 p.m. Mr. Wolfenden told the union bargaining committee that if the employer's final offer was not accepted, that the offer would be withdrawn when the strike commenced. Mr. Haskins testified that Mr. Wolfenden made this statement at 6:30 p.m. only, and not earlier in the negotiations. Both Mr. Ali and Ms. Lesperance never heard Mr. Wolfenden say that if the union commenced a strike, that the employer's final offer would be withdrawn. Finally, Mr. Wolfenden never testified at this hearing, so the Board did not have the benefit of his evidence. It is noteworthy, however, that in the two responses to these applications, filed by lawyers in Mr. Wolfenden's law firm who had apparently discussed with at least Mr. Aiken what had transpired on that day, there is no mention of Mr. Wolfenden having stated that the offer was withdrawn at any time on January 8, 1997. In all of the circumstances I am not convinced that Mr. Wolfenden ever told the union bargaining committee on January 8 that the employer's final offer would be withdrawn once the union went on strike. It is possible that Messrs. Aiken and Haskins had discussed this matter with Mr. Wolfenden in their private caucuses on that day. However, in the absence of any evidence from Mr. Wolfenden himself on this contentious point, when even Messrs. Aiken and Haskins do not agree on the timing of the comment being made, and when no one for the union heard the comment, I am not prepared to find that the comment was made at any point in open session that day.

22. Mr. Aiken testified that after he returned to the plant on January 8, 1997, he noted that production had slowed down or stopped, and that employees were milling about even though the strike was not due to start till midnight. He intimated in his evidence that the employer was quite tolerant of this behaviour, even though people should have been working until the strike began. Mr. Haskins'

evidence contradicts Mr. Aiken's version. He and Mr. Aiken returned to the plant together. Mr. Haskins attended the last part of a meeting called by Mr. Roseborough of all of the afternoon shift staff. Mr. Roseborough told the employees that negotiations had broken down, that a strike would commence at midnight, and that they could leave immediately if they wanted to. He indicated they would be paid to the end of their shifts. According to Mr. Haskins, by 8:30 p.m. he is not sure if any afternoon shift staff were still there. No production took place. After the 11 p.m. shift arrived, Mr. Roseborough told them they could also leave if they wanted to, and that they too would be paid for the one hour before midnight. Mr. Haskins never expected any production to take place since everyone had been told by Mr. Roseborough that they could go home. I accept Mr. Haskins version of events over Mr. Aiken's. I am bolstered in this by the fact that Mr. Ali had also returned to the plant at around 7:10 p.m. and saw the meeting with Mr. Roseborough in session. He waited outside the cafeteria but Mr. Roseborough came out, spoke to him, and invited him into the meeting. Mr. Ali was told by Mr. Roseborough that everyone was being sent home from this shift, and would be sent home from the midnight shift as well.

23. Mr. Haskins and the union strike committee negotiated a protocol for the picket line. However, at some point that protocol was violated by the picketers with the result that the responding party applied for an injunction against picketing, the details of which have been outlined in chronological order below.

24. Within two days of the strike commencing Ms. Lesperance heard that PC World had begun to hire replacement workers. A number of employees crossed the picket line to return to work in the first two weeks of the strike. More followed later. When the strike commenced PC World had back orders to fill and only 45 salaried staff. A decision was made to utilize all of the salaried staff in production, with the exception of Mr. Aiken, who was to field all labour-related problems. While the employer lost \$1.1 million in the first quarter of 1997 due to the strike, it has continued production throughout the strike. It is believed that in the second quarter of 1997 there has been a marked improvement in plant production, so that the employer hopes to break even or make a profit in this quarter.

25. A number of bargaining unit employees indicated to the employer as the strike began that they wanted to come to work. They were invited back to work, and did not have to fulfill the requirements of section 80 of the *Labour Relations Act, 1995* to do so. (A few employees who returned to work after two months on strike did have to send letters to the employer to request to return to work). Mr. Aiken claims that when the picketers saw fellow employees crossing the picket line they became upset. He alleges that he was told that the picketers would prefer if new replacement workers were hired instead of fellow employees crossing the picket line. Hence, Mr. Aiken began to hire replacement workers in the first week of the strike. By the second week of the strike the employer had hired 20 replacement workers and twenty bargaining unit employees, who had returned to work, also continued in employment. The employer operated one long shift of 11 to 14 hours at first. After a few weeks a second shift was added, and later on, the employer returned to its original three shift schedule. After two months of the strike the salaried employees were slowly extricated out of production and returned to their former duties. PC World now has one third more employees working in production than it did just prior to the commencement of the strike. As of March 24, 1997 the employer had in its production unit 34 bargaining unit members, 17 newly hired people, and 42 people from a personnel agency. Where just prior to the strike commencing there were approximately 77 people at work in the bargaining unit, at the time of the hearing there were approximately 119 people working.

26. In the first week of the strike Ms. Lesperance called Mr. Roseborough, to try to get the employer to go back to the bargaining table. Mr. Roseborough did not return the first phone call. On the second occasion he told Ms. Lesperance that he would talk to Mr. Wolfenden. He was of the view that the union bargaining committee was still in a state of high resolve and that nothing had changed

yet, so he was not really interested in returning to bargaining. Ms. Lesperance asked Mr. Roseborough to please come back into bargaining, and that she was sure they could find a middle ground. Since Mr. Roseborough did not testify at this hearing, the Board did not have the benefit of his evidence. Two days later, when Mr. Wolfenden had not yet contacted Ms. Lesperance, she called him. He indicated that it was his view that the union committee was not yet ready to negotiate, that it was still strong and not ready to change its position.

27. After the first week of the strike Ms. Lesperance called Mr. Roseborough a total of four or five times but was never able to reach him. On two occasions she left him messages which he did not return. She only spoke directly by telephone to Mr. Roseborough on the one occasion in the first week of the strike.

28. Ms. Lesperance did not try to call Mr. Aiken, although she spoke to him twice on the picket line. On one occasion early on in the strike she saw Mr. Aiken when he was talking to people on the picket line. On the second occasion, about six or seven weeks into the strike, she approached him as he was driving across the picket line and asked him if the employer would return to bargaining. Mr. Aiken told her the bargaining committee's attitude was not yet "right", but that he would pass along her message to Mr. Wolfenden.

29. Mr. Wolfenden was contacted by Ms. Lesperance on a regular basis throughout the strike. Sometimes she would call him weekly, sometimes daily. She called him on his cell phone, at his home, and left messages on his voice mail at his office. According to Ms. Lesperance, she would have done anything to end the strike, and she therefore spoke to or attempted to contact Mr. Wolfenden to attempt to achieve that end. Mr. Wolfenden told Ms. Lesperance that it was Mr. Aiken's view, based on his conversations with workers on the picket line, that the union committee was still not ready to change its position as it was still feeling strong. As the strike progressed, Mr. Wolfenden told Ms. Lesperance that the picket line problems were costing the employer a lot of money, and that the employer would not bargain until the problems stopped.

30. Following an application by the responding party for an injunction, on February 18, 1997 Festeryga J., Ontario Court of Justice (General Division), issued an order (unopposed by the union) enjoining and restraining the union to no more than six picketers at each of the four entrances to the employer's property. There were distance and time restrictions also imposed, along with directions that the picketers could not make threats to anyone seeking entry onto the employer's property, and there could not be any trespassing and vandalism.

31. Ms. Lesperance attempted to arrange a meeting with the employer through the conciliation officer. At the end of February she reached the conciliation officer in person, but he indicated he was having trouble reaching the employer. Ms. Lesperance told the conciliation officer that the employees on the picket line were demoralized, and that she wanted to resume bargaining. Nothing came of this discussion with the conciliation officer.

32. Bob Chernicki, an assistant to the CAW President Buzz Hargrove, and Ms. Lesperance's superior in the CAW-Canada, also attempted to contact Mr. Wolfenden to try to get bargaining back on track. Finally Mr. Wolfenden agreed to meet with only Ms. Lesperance and Mr. Ali for a dinner meeting to attempt to reach an understanding about how the parties could begin to bargain again. Mr. Wolfenden was to bring Mr. Aiken or Mr. Roseborough with him, and they were all to meet at 7 p.m. on March 13, 1997. However, on the morning of March 13th there was a significant altercation on the picket line and Mr. Wolfenden cancelled the meeting saying that the employer wanted to reassess its position. Within two days of March 13 Ms. Lesperance called Mr. Wolfenden to try to get him to reschedule the meeting, but he said that Mr. Roseborough was extremely upset and that the employer was not ready to meet at

this time. Ms. Lesperance tried to convince him that if they could only meet then things could move forward, but to no avail.

33. As a result of some violent actions on the picket line on March 13, 1997, the responding party returned to the Court on March 18, 1997 with contempt proceedings. It was seeking to have the Court send Mr. Ali and Ms. Lesperance to jail, fine the union, order the union to pay for damage to property, and to have the judge enjoin the union from any picketing on the employer's property. On March 13 it appears that between 6 and 8 a.m. a large number of CAW supporters, who were largely not employees of PC World, demonstrated at the employer's premises, trespassed on the employer property, smashed some windows, damaged vehicles belonging to employees, and delayed vehicles entering PC World. On March 20, 1997 Somers J., of the Ontario Court of Justice (General Division) found there had been breaches of Festeryga J.'s order regarding picketing, but did not find that any of the PC World employees or CAW personnel named had committed any of the acts alleged or had counselled, aided or abetted anyone else to do so. Somers J. therefore declined to grant PC World most of the relief it was seeking. However, he did vary the terms of the Festeryga injunction order so that there was a total ban on picketing at PC World.

34. On March 17, 1997 Ms. Lesperance saw Mr. Roseborough as he was crossing the picket line in his vehicle. She introduced herself, as he had never met her before, and asked if they could please get back to the bargaining table. Mr. Roseborough told Ms. Lesperance that as long as there were CAW "goons" on the picket line he was not prepared to bargain. Furthermore, he told Ms. Lesperance, that the union bargaining committee and about ten other employees would never set foot in his plant again. He was prepared to wait till a new negotiating committee was elected before he would talk to Ms. Lesperance. Mr. Roseborough told Ms. Lesperance that the company had lost about \$1 million and had been on the verge of bankruptcy. Ms. Lesperance tried to explain to him that she did not condone illegal acts and that she did not know who had caused the damage to the plant property. She pointed out that the employer was inciting high emotions by holding pizza parties for the replacement workers, to celebrate the end of another week of having beaten the strike. Nothing came of this conversation and the parties did not return to bargaining.

35. According to Mr. Aiken the employer hosted three Friday pizza lunches in the early weeks of the strike when the employees had worked particularly hard. The employer used the lunches to meet with all employees and to discuss with them the achievements up to that point. PC World also hosted a Valentine's Day party for the employees at which they had red and white balloons, cake and roses for the female staff. It was the employer's view that these were necessary gestures of thanks to employees who were making extraordinary efforts to get to work and to maintain production.

36. On March 20, 1997, after the Court decision issued removing all pickets from the picket line, Ms. Lesperance sent Mr. Wolfenden a letter asking again to return to bargaining so that the parties could put an end to the long strike. She received no response.

37. Ms. Lesperance conceded that prior to the meeting which she and Mr. Wolfenden had planned for March 13, 1997, Mr. Wolfenden had said that if the parties ever got back to the bargaining table, then the last employer offer would probably be gone because the strike had cost the employer over \$1 million. He indicated that there would be a lot less in an offer now than there had been before. Ms. Lesperance had been prepared to meet under these conditions, but that meeting never took place. Hence, Ms. Lesperance was of the view that the employer's last offer was still outstanding and capable of being accepted by the employees. Therefore, on March 23, 1997 a bargaining unit meeting was convened to present to the membership the company's last offer from 1:30 p.m. on January 8, 1997. A secret ballot vote was held in which the employees voted overwhelmingly to accept the employer's January 8th offer. Ms. Lesperance contacted Mr. Wolfenden by FAX that same day to inform him that

the members had accepted the employer's 1:30 p.m. offer from January 8, 1997, and to inform him that the workers would be ending their strike and returning to work on March 24, 1997.

38. On March 24, 1997 many employees on each of the three shifts at PC World attempted to return to work. Each had been given a copy of Ms. Lesperance's letter to Mr. Wolfenden informing him and the employer of the ratification of the purported last offer. Mr. Aiken spoke to a number of the employees who arrived for the 7 a.m. shift and told them that there was no outstanding offer and that they could not return to work unless each of them wrote to him to indicate that each one wanted to return to work. He would then discuss the conditions under which they could do so. On one employee's letter he wrote "The final position was withdrawn when the bargaining unit went on strike. Steve Aiken March 24/97". Mr. Aiken also spoke to employees who attempted to return to work for the afternoon shift and told them the same thing.

39. Ms. Lesperance received a letter from Mr. Wolfenden on March 24th telling her that the offer made to the union on January 8, 1997 had been "withdrawn sometime ago". He indicated that any employees who wished to return to work could follow the procedure outlined in the *Labour Relations Act, 1995*, and that they could do so on the terms and conditions the company had now set. Mr. Wolfenden indicated that the employer was of the view that the union was still on strike. He made no mention of returning to bargaining.

40. In a telephone conversation Ms. Lesperance had with Mr. Wolfenden, she attempted to elicit from Mr. Wolfenden what the working conditions inside the plant were, but he did not tell her anything. She therefore wrote to Mr. Wolfenden on March 26, 1997 and asked that she be advised immediately of what exactly the wages, benefits, and working conditions were for the replacement workers working at PC World, so that she could inform the bargaining unit members who were out on strike and may wish to return to work. If the working conditions were reasonable, Ms. Lesperance was going to recommend to the striking workers that they return to work while the union continued to bargain with the employer. Ms. Lesperance indicated she was getting desperate as the company was operating using replacement workers and bargaining unit members who had returned to work, there were no pickets allowed, and the employer was now saying it had withdrawn its last offer. She was concerned about the 80 demoralized striking workers. Mr. Wolfenden never responded. Mr. Aiken saw that letter, but he did not respond either, as he understood that Mr. Wolfenden would take care of it. It was not until the fifth day of this hearing, when Mr. Aiken was testifying, that the union finally heard what the working conditions were for the employees who had returned to work following the commencement of the strike. It would appear that employees at work in the plant are working under the conditions outlined in the employer's proposal of April 18, 1997. Thus, those who had been earning more than \$12 per hour before the strike have had their rate reduced to \$12, and those earning less than \$12 per hour are being paid at whatever was their rate before the strike. Floaters and team leaders are receiving a \$2 per hour premium. Those working on an evening shift are receiving a 50 cents per hour shift premium. The benefits have not yet been changed to reflect what the employer has proposed.

41. The union applied for a stay of Somers J.'s decision. By a decision dated May 23, 1997, Laskin J.A. for the Court of Appeal of Ontario, found that after the strike began there had been some instances of picketers intimidating workers crossing the picket line and some car tires had been slashed, when tensions had mounted after replacement workers had been hired and bargaining unit members had returned to work. However, after the first injunction, Laskin J.A. found that the union had generally obeyed the terms of the Court order. However, on March 13, 1997 there had been the breaches outlined above and there had been some breaches between March 13 and 20, 1997. There had been no breaches of the Court order of March 20, 1997. Laskin J.A. therefore granted the stay requested by the union, and, except for five named individuals who had been found to be in contempt of the original injunction order, he restored the Festeryga J. order.

42. On April 4, 1997 the union filed the first unfair labour practice complaint with the Board. Thereafter, Bob Chernicki made a direct request to the Ministry of Labour for mediation assistance, and eventually a meeting was set up between the parties for April 16, 1997. On that date the parties never met face to face, each sat around for about 5.5 hours, and at the end of the day the mediator told the union that it would be receiving a written offer from the employer. There were no negotiations on April 16, 1997.

43. The employer sent to the union its new offer on April 18, 1997, and advised that it was prepared to continue mediation. In the union's view the employer's latest proposal seeks to gut the previous collective agreement, even on relatively uncontentious matters. From the employer's vantage point, the proposal was to be a starting point in negotiations, and was not an attempt to put forward a document which the employer knew to be incapable of acceptance by the union. Rather than reciting the parties' respective views on the various provisions, I intend to review all of the proposed substantive changes to the last collective agreement.

44. Article 1, the Statement of Principles and Intent, was amended to add the following:

"Ultimately, in this highly competitive circuit board business, the company and its employees must constantly strive to exceed customer expectations in order to maintain PC World's prominent position in the industry."

45. In Article 5.08, the provision for Data to be Supplied to the Union, the employer proposed to only provide all data regarding employee seniority, rates, classifications, transfers into and out of the bargaining unit, leaves of absence, layoffs, recalls, lost seniority, discharged employees, etc. on a semi-annual basis upon request, instead of providing such information quarterly, without the requirement of a union request, as had been the case previously.

46. The Seniority provision, Article 7, was to be changed so that a seniority list would be provided to the union and posted in the workplace annually, where it used to be provided every six months. The probationary period was doubled from 65 to 130 days actually worked in a 12 consecutive month period. Seniority is not granted until an employee passes his/her probationary period, so that this doubles the period before an employee acquires seniority (Article 7.04). Employees will lose all seniority if they do not return from layoff within 3 days of recall, whereas they used to have 5 days in which to return (Article 7.06 (D)). Laid off employees will lose all seniority and be terminated after 12 months of layoff, as opposed to the 18 months previously in Article 7.06 (F).

47. In the previous agreement, in Article 7.08 the parties had recognized that job opportunities and seniority should increase in proportion to length of service, and all promotions, demotions, filling of vacancies, layoff and recall were to be strictly in accordance with this principle. The employer has added a provision to this section such that this Article is now made subject to the criteria in Articles 8.02 and 10.02. Article 8.02 has been significantly altered in this proposal so that during a layoff, bumping rights have been made subject to a bumping employee having to prove that he or she is "as or more qualified" than the incumbent to perform the work efficiently. Hence, where previously a bumping employee had to be qualified to do a job efficiently, now such an employee would have to compete with the incumbent employee for the job, no matter that the incumbent would be a person of less seniority. The provision would appear to diminish the utility of Article 7.08.

48. Changes to Article 9.02 would lead to a transfer being considered temporary for a 60-day duration, whereas it used to be for a 30-day duration. During this period the transfer position is not subject to the seniority provisions of the collective agreement. Hence, the employer would be further diluting the seniority protections.

49. When new jobs are created or vacancies occur, the employer used to post the job for three days. Under the proposal, the posting would be up for two days (Article 10.01). Pursuant to Article 10.03, one subsequent job vacancy, created by a successful internal candidate filling the vacancy, was also posted. The employer proposes to change this so that any subsequent job vacancy is to be filled at the discretion of the employer.

50. In December 1996 the parties had agreed to some changes to Article 14.01. The employer has proposed maintaining those changes, and seeks to add that an employee must utilize any remaining vacation time before commencing an authorized leave of absence.

51. Article 38, Work by Supervisors, has a number of proposed changes to allow supervisors to work on the development and production of prototypes, the assessment and development process improvement, to replace workers who have declined to work overtime, when bargaining unit employees are not readily available, and during breaks and lunch periods to deal with backlogs or to alleviate production delays. Supervisors and excluded employees had only been permitted to do bargaining unit work previously during emergencies, and two other very limited circumstances.

52. The above items are the non-monetary items on which the employer made proposals. It also had a number of monetary proposals in its April 18, 1997 offer. The employer proposed to reduce the number of unpaid days employees could take for union courses from 20 days per year to ten days per year (Article 16.02). The shift premium is to be reduced from 10% of the hourly rate to 50 cents per hour, and would only apply to hours worked between 6 p.m. and 6 a.m. where the majority of the scheduled shift falls between these hours. Under the previous collective agreement the shift premium used to apply between 3 p.m. and 7:15 a.m. (Article 17.01).

53. The overtime pay provisions, Articles 33.04 and 33.05 are changed completely so that the employer proposes to reduce the payment for overtime to the minimum standard articulated in the *Employment Standards Act*. The rest periods were to be reduced to one per shift, of 10 minutes duration, where there used to be two 15-minute rest periods per shift (Article 34.01). Two five-minute wash-up periods, one before the lunch break and one before the end of the shift, were to be completely eliminated (Article 35.01). Employees required to work on a paid holiday used to be paid twice their regular hourly rate for all hours worked, plus holiday pay. The employer proposes to reduce the payment to 1.5 times the regular hourly rate, plus holiday pay (Article 49.03).

54. In the area of benefits, the employer proposes to reduce benefits by increasing the interval between dental check-ups from 6 months to 9 months; to require that generic drugs be used where available; and, physiotherapy be provided to a maximum of \$500 per year.

55. In the Wages article, Article 51, there are a number of proposed changes such that there would be only two classifications, one for Operators paying a range of \$9 to \$12 per hour, and another for Skilled Trades, paying a range of \$16 to \$20 per hour. There used to be six groups of classifications in the previous collective agreement. Any employee making over the maximum in the range would be reduced to the maximum rate for his or her classification. Employees earning less than the maximum would have their rates frozen for the life of the collective agreement. The employer, in its discretion, can designate "floaters" who would receive a \$2 per hour premium. It can also, in its discretion, designate "Team Leaders" who would also receive a \$2 per hour premium. The employer can remove the floater or team leader designation at its discretion. Employees cannot receive a pyramiding of premiums.

56. It is undisputed that approximately half of the bargaining unit (44 to 45 employees) would be affected by the proposed wage rate changes such that they would have their hourly rates reduced to \$12 per hour, some from a high of \$16 per hour. Most of the affected employees would experience a

\$1/hour reduction in hourly wages. All of the employees of PC World have not had a wage increase in years, even prior to the strike.

57. Of the 36 or 37 people who have crossed the picket line and returned to work, ten employees have had their wages reduced to either around \$12 per hour, or to \$14 per hour. This latter rate would be given because where someone earned over \$12 per hour before the strike, by designating such persons as floaters or team leaders, the employer gave them the premium rate when they crossed the picket line and returned to work. The returnees are not representative of the bargaining unit in general. Prior to the strike there were between six and 10 team leaders per shift. The floater position did not exist before the strike, however, the employer did have a QTA position (Quick Turnaround) which was similar to the new floater position.

58. According to Mr. Aiken, the new proposals represent the product of months of discussions during the strike, in which senior management met with Mr. Wolfenden to review what the employer wanted. The meetings began in January 1997 and continued. There were many meetings held and vigorous internal discussions about what was relevant to the future course of the responding party. Mr. Haskins testified that he had been asked for his wish list for what he would like to see in a new collective agreement, and he indicated he wanted to see supervisors able to do any work they wanted to, and to have a part-time reserve labour force which could be utilized whenever the employer needed anyone. It would appear that Mr. Haskin's suggestion regarding supervisors doing bargaining unit work was incorporated in part into the employer's April 18th proposal. Mr. Aiken intended that in this proposal the employer would deal with a lot of the operational changes it had wanted to make over time, and which may have taken a number of contracts to achieve. Hence, the employer decided to replace the matrix system with one classification and wage rate with the objective of encouraging flexibility. Multi-skilled people would be paid more as floaters or team leaders.

59. While Ms. Lesperance was not surprised by the employer's proposals having hardened to reflect the fact that it too had endured a three and a half month strike, she was surprised that the employer appeared to want to "gut" the collective agreement. Nonetheless, following receipt of the employer's proposal, the union held a bargaining unit meeting and explained the proposal to the employees. In addition to the specific proposals outlined above, the employer had also indicated in the proposal document that there would be contracting out of work which the bargaining unit had done prior to the strike, a department would be eliminated, other positions would be eliminated, and supervisors would be able to do bargaining unit work. Approximately 16 bargaining unit positions may be eliminated by the contracting out of work and the closure of a department. The employees had hoped for something on which they could return to work, but found the employer proposal completely unacceptable. Notwithstanding the reception the employer's proposal got, Ms. Lesperance indicated at the hearing her willingness to continue to bargain with the employer. Ms. Lesperance has indicated that while the union was prepared to negotiate, it could not live with all of the concessions the employer is seeking. Ms. Lesperance believes the employer proposal of April 18, 1997 was designed for rejection by the union membership. Since April 18, she has asked the employer for the costs it is claiming for clean up of the strike site, and has asked for the employer's proposal for a "back to work" protocol, but has received nothing. The parties appear to have only met once since April 18th to discuss a protocol for future negotiations.

60. The employer has suggested that after December 4, 1996 the union never made any written proposals while the employer made a number of written proposals. The Board is satisfied that this was the way the parties had implicitly agreed to operate. There is no suggestion in the evidence that after December 4, 1996 the employer ever asked the union to reduce its proposals to writing, and indeed, the union never did. Therefore, nothing can be taken from the conduct of the union in bargaining in this respect.

61. The employer has also suggested that the union has been unprepared to respond to or negotiate the April 18, 1997 employer proposal. That suggestion is at odds with the evidence of Ms. Lesperance that after receipt of the April 18th proposal she telephoned Mr. Wolfenden to discuss the proposal with him. A meeting was subsequently held on April 29, 1997, attended by Ms. Lesperance, Mr. Ali, and Hemi Mitic, an assistant to the CAW-Canada President, and with Messrs. Wolfenden and Aiken. At that meeting the union indicated to the employer that it could accept the *status quo*, but could not agree to the employer wanting to take everything out of the collective agreement, which the union characterized as “union busting”. Mr. Aiken confirmed that the union made some comments about the proposal at the meeting on April 29, 1997. The union did not give the employer its second unfair labour practice complaint until after the end of the meeting as it had hoped to avoid doing so if the employer showed any sign of being prepared to start to bargain. However, by the end of the April 29th meeting it was of the view that the employer was not going to bargain about its April 18th proposal.

62. PC World is of the view that its January 8, 1997 offer was withdrawn when the strike commenced. It is undisputed that the parties never met between January 8 and April 16, 1997, and that no employer offer was substituted for the January offer, until April 18, 1997. According to Mr. Aiken the employer would not meet with the union because there was too much negative activity on the picket line, the union bargaining committee’s expectations were too high, and everyone in PC World was too busy producing product to find time to meet with the union.

DECISION

63. The union has alleged breaches of sections 5, 17, 70, 72, and 76 of the Act. However, the two applications appeared to focus on union contentions that the employer failed to meet and bargain in good faith, and to make reasonable efforts to reach a collective agreement between January 8 and April 29, 1997. The focus of the Board’s consideration in these applications has therefore been on section 17 of the Act. It is worth noting at the outset that the union was not making any allegations about the employer’s bargaining conduct prior to January 8, 1997, and there would appear to have been no problem with bargaining up until the strike commenced.

64. The first question for the Board to address itself to was whether there was an offer outstanding from the employer on January 8, 1997 and thereafter, until the union membership purported to ratify that offer as a collective agreement on March 23, 1997. It was the union position that the employer never withdrew its offer on or after January 8th, and that since the parties never met thereafter, and before the ratification meeting of March 23, 1997, that the offer remained outstanding. It was PC World’s position that the offer was specifically withdrawn on January 8th once the union commenced the strike, and that the union was further alerted to the withdrawal in early March 1997 when Mr. Wolfenden and Ms. Lesperance were discussing the meeting which was eventually set for March 13, 1997. In any event, in the context of a long strike, the employer argued that the offer should be considered to have elapsed.

65. On the evidence before me, and for the reasons outlined above in the review of the evidence, I am of the view that PC World never told the union on January 8, 1997 that if a strike commenced that the employer’s last offer was being taken off the table. From the evidence it would also appear that as of early March, Mr. Wolfenden was simply saying that *if* the parties got back to the bargaining table, then the union could expect that the employer’s last offer would no longer be available. As is clear, the parties never got back to the bargaining table before March 23, 1997, when the employees claimed to ratify acceptance of the outstanding offer.

66. In *Shoppers Drug Mart*, [1994] OLRB Rep. Oct. 1419, the Board reviewed the jurisprudence regarding the extinguishment of an offer in the context of a strike or lock-out. The Board stated:

23. In *The Toronto Jewellery Manufacturers' Association*, [1979] OLRB Rep. July 719, the employer made an offer for renewal of a collective agreement at a meeting with the union in January 1979. At that juncture the union made a counter-offer. Nonetheless, the employer reduced its offer to writing and sent it to the union in February, 1979. The employer thereafter notified the union in March, 1979, that it was making no further proposals. The union took the bargaining unit out on strike between early and the middle of April, and then on May 8, 1979, advised the employer that it was ratifying and accepting the employer's last February offer. When the employer then refused to sign a collective agreement, the union argued that the employer's last offer, its March notification, and the union's acceptance of the employer offer, constituted a collective agreement. The question considered by the Board in that case was whether the offer was still outstanding for the union to accept in May 1979, and the Board stated as follows:

8. Collective bargaining is a dynamic process and it is also one to which the parties apply their relative bargaining strengths in an attempt to gain from each other concessions and compromises which eventually produce a collective agreement. There is an implied expectation in the give and take of collective bargaining that concession and compromise will result in agreement without the exercise of economic sanction. In fact, it is not uncommon for either party to make this an explicit condition attached to tentative agreement on any or all items so that, if there is either a lockout or strike, all issues are "back on the table". There is no evidence in our case that such a condition was attached to the Association's last offer and the evidence is that it did not subsequently withdraw its offer. The Board, therefore, must consider what effect, if any, the passage of time and the intervening events have had on the status of the offer.

24. The Board in that case found that since the employees had been on strike for three weeks before the union tried to accept the employer's February offer, the employer's last offer had by then been extinguished by the passage of time and the intervening event of the strike.

25. In *Wilson Automotive (Belleville) Ltd.*, [1980] OLRB Rep. July 1136, the employer made a final offer to the union, which was rejected and the employees went on strike for over six months. More than five months into the strike the employer informed the union that due to its business deteriorating as a result of the strike, it was withdrawing its earlier proposal. Nonetheless, approximately two weeks later, and six months into the strike, the union said it was accepting the employer's pre-strike offer. When the employer refused to endorse such an agreement, the union complained to the Board that the employer was acting in bad faith. The Board found that if the financial condition of a company deteriorates after it has made a monetary offer in collective bargaining, but before the union has accepted that offer, then the employer may have cause to reconsider its offer and it should communicate its revised position to the union at the earliest possible date. In that case as the employer did not inform the union of its changed position until five and a half months into the strike, and the employer altered its bargaining position dramatically, the Board found a section 15 violation. In *Radio Shack*, [1985] OLRB Rep. June 901, the union struck for almost six months before informing the employer it was accepting the employer's last offer made just prior to the commencement of the strike. The employer immediately indicated to the union that there was no contract reached between them as a result of the union's acceptance. The Board adopted the reasoning in *Toronto Jewellery Manufacturers' Association*, supra, and found that the employer's offer had been extinguished by the passage of time and the intervening lengthy strike, and found that the employer had not violated section 15.

67. Notwithstanding that I have found that the employer did not specifically withdraw its offer on January 8, 1997, I am of the view that by early March, when the strike had been in progress for two months, and when Mr. Wolfenden had informed the union of the employer intention to change its offer should bargaining resume, that the union should have understood that the employer offer was no longer outstanding. The union had engaged in a bitter strike of more than two and a half months duration by the time that it purported to accept the employer's offer. In the context of such a lengthy strike, and when counsel for the employer had signalled to the union three weeks before the ratification meeting that the offer would be changed, I am satisfied that the employer offer of January 8, 1997 had been extinguished by the passage of time and the course of the intervening events.

68. The union argued, in the alternative, that if the employer offer had been withdrawn or extinguished, then the employer had failed to bargain in good faith because it had never met with the union once from the commencement of the strike, and until April 16, 1997.

69. Section 17 of the Act states:

The parties shall meet within 15 days from the giving of the notice or within such further period as the parties agree upon and they shall bargain in good faith and make every reasonable effort to make a collective agreement.

70. In *Wellington-Dufferin-Guelph Health Unit*, [1979] OLRB Rep. Nov. 1115, the Board outlined its approach to cases alleging a breach of what is now section 17 of the Act. The language of this section has not changed, and what the Board said then remains appropriate. At paragraphs 22 and 26 the Board stated as follows:

22. The duty to bargain in good faith has been part of the collective bargaining law of the Province of Ontario since 1944. Its present statutory formulation imposes two requirements:

(a) to meet and bargain in good faith; and

(b) to make every reasonable effort to make a collective agreement.

The first requirement refers to the parties' state of mind or motivation. Essentially it requires negotiations with the shared intention of achieving agreement. The second part of the statutory duty requires that there be a significant commitment of time, effort and energy in the pursuit of this shared objective. There is an obligation to follow a procedure which will increase the prospects for a negotiated agreement, and will minimize the likelihood of industrial conflict. Of course, it is undeniable that the use of economic power underlies the collective bargaining process. There is no inconsistency between a genuine desire to come to agreement and reliance upon one's economic power to get the kind of agreement one desires. Section [17] is not intended to equalize bargaining power, nor is a party with superior economic leverage prohibited from "hard bargaining" in pursuit of his own economic advantage. The Board does not sit in judgment on the reasonableness of the parties' position, or impose its own notions of fairness upon them. On the other hand, if the Board is not to be blinded by empty talk and the mere surface motions of collective bargaining, it must take some cognizance of the substantive positions taken by the parties in the course of their negotiations. As a practical matter, it will be difficult to demonstrate that one has bargained in good faith and made every reasonable effort to make a collective agreement if one has rigidly adhered to a position for which there is no apparent rational justification. One cannot really divorce the parties' bargaining behaviour from the substantive positions which they have taken and, in making its section [17] determination, the Board may be influenced by both. The real problem is to fashion a standard of "good faith" and "reasonable efforts" which does not impair the consensual aspect of the bargaining process or encourage parties to seek, through litigation, what they have been unable to achieve at the bargaining table.

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26. It is clear that the expiry of the conciliation process or the occurrence of a strike does not extinguish the union's bargaining rights or the parties' obligation to bargain in good faith - although the contents of the duty to bargain may change. The Board in *New Method Laundry*, 57 CLLC para 18,059, put it this way:

"Although the obligation to bargain is not extinguished when the time limit set in section 49 [now 63] has come to an end, the nature and extent of the bargaining in which a party is required by law to engage at that point may be quite different from what they were earlier. It is impossible to spell out in detail what an employer or a trade union will or will not be required to do at that stage in order to comply with section [17]. Each case will turn on its own peculiar facts and there is little profit in seeking to set out my views on what must of necessity be a series of hypothetical situations. Some of the factors which will have to be taken into account will probably be whether one of the parties has

requested the other to resume negotiations, whether the party making such a request has indicated that it is prepared to make significant concessions, whether a strike or lock-out is in progress and similar matters.

That case involved an attempt to pursue negotiations after the commencement of a bitter strike, but we believe the principles espoused are equally applicable here. The Act does not require that a party engage in fruitless marathon discussions at the expense of a frank statement in support of his position, but as Professor Cox commented:

Participation in debate often produces changes in a seemingly fixed position whether because new facts are brought to light or because the strength and weaknesses of the several arguments become apparent. Sometimes the parties hit upon some novel compromise of an issue which has been thrashed over and over. Much is gained even by giving each side a better picture of the strength of the other's convictions. The cost is so slight that the potential gains easily justify legal compulsion to engage in the discussion.

71. The union commenced its strike on January 8, 1997. Although there is scant evidence before the Board about what precisely transpired on the picket line in the early weeks, it appears uncontradicted that picketers engaged in some intimidatory tactics against those crossing the picket line to go to work. Hence, on February 18, 1997 an uncontested injunction regarding picketing was issued limiting to six per entrance the numbers of picketers, along with some other restrictions. There is no evidence that there were serious problems with the picketing restrictions until March 13, 1997, when there were violent confrontations and breaches of the injunction. On March 18 the Court issued a total ban on picketing, and there were no breaches of that injunction before the parties met for the first time since the commencement of the strike, on April 16, 1997.

72. As has been outlined in the evidence, from the commencement of the strike the union persistently asked and pleaded to meet with the employer to recommence bargaining. The employer steadfastly refused to do so until early March when it appeared it would have been prepared to meet, although not to bargain. Nonetheless, the union was prepared to meet under any circumstances. It is understandable that the employer cancelled the March 13th meeting in light of the violence on the picket line that day. However, after it had a total ban on picketing on March 20, it still refused to meet. PC World did not agree to meet with the union until *after* the filing of the first unfair labour practice complaint which relied upon and outlined all of the efforts the union purported to have made to get back to the bargaining table, and which alleged that the employer had been bargaining in bad faith by refusing to meet.

73. Section 17 requires that there be a *shared* intention of achieving a collective agreement, and that the parties commit a significant amount of time, effort, and energy to pursuit of that objective. On the evidence before the Board it is apparent that, except for agreeing to the March 13th meeting, PC World did not make any real effort to meet and bargain with the union despite repeated union entreaties which began in the first week of the strike in January and continued on until April. The Board accepts that during the period between March 13 and 20 the employer had good reason not to pursue any negotiations, given the nature of the breaches of the Festeryga J. injunction order.

74. Looking first at the period from January 9 to March 12, 1997, it would appear that the employer never closed its plant for one working day. One reason given by the employer for not meeting with the union is that it was very busy with production issues, and therefore had no time to devote to bargaining. PC World recommenced production on the first day of the strike, and it hired replacement workers to augment those employees who had crossed the picket line to return to work within a week of the strike beginning. The Board recognizes that a strike is an extremely disruptive event to the production and running of a company. Therefore, it is understandable that PC World may have been unable to contemplate negotiating in the first two weeks of the strike while it was trying to train new people and keep production going. However, there is no cogent explanation for why the employer did

not bargain thereafter, and until March 12. Despite Mr. Aiken's evidence that the employer was extremely busy focusing on production, and that Mr. Aiken was the only employee of the company not dedicated to the production line, from early January on, Mr. Aiken and other senior management were meeting frequently with Mr. Wolfenden to formulate new proposals. If the members of senior management had time for extensive meetings with Mr. Wolfenden, it is unclear why they did not have time to meet to bargain for a new collective agreement.

75. A second reason advanced by the employer for not meeting with the union to bargain is that there were problems on the picket line, and that the employer was unprepared to meet until those problems ceased. It is not unusual during a strike for there to be picket line incidents, but, in the absence of other compelling reasons, that cannot be a reason for an employer to refuse to meet to negotiate. It seems obvious that the longer a strike goes on, with replacement workers and others crossing picket lines, and when an employer refuses to meet to bargain, the level of frustration on the picket line rises. It is incumbent on parties to behave in a responsible fashion in these circumstances, and the Board does not condone picketers' engagement in any illegal picket line activity.

76. On February 18, 1997, Festeryga J. issued an uncontested injunction limiting picketing. According to Laskin J. there were no violations of the injunction between February 18 and March 12. It is therefore unclear why the employer did not meet with the union during this three-week period, when Ms. Lesperance had been asking PC World to resume bargaining for months.

77. As noted earlier, it is understandable why the employer did not wish to meet with the union in the aftermath of the March 13th fracas. However, following the Somers J. total ban on picketing on March 20, 1997, and given that there were no violations of that injunction, there is no cogent explanation for why PC World then continued to refuse to meet with the union to bargain. By that stage in the strike the employer was running three shifts, as it had before the strike, there were no picketers and no picket line disruptions, and its senior management was still finding time to have meetings with Mr. Wolfenden to formulate proposals. However, despite Ms. Lesperance's requests there was no movement to the bargaining table. Even after the union's purported acceptance of the employer's last offer, and after the employer had said that offer had been withdrawn some time ago, PC World did not make any attempt to resume bargaining. Furthermore, PC World would not give Ms. Lesperance any of the information about what conditions the striking workers could return to work under if they decided to ask the employer to return to work.

78. PC World's third reason for not meeting with the union to bargain is that the employer was of the view that the bargaining committee's attitude was not yet right, and that its expectations were too high. It is unclear to the Board how the employer came to hold this view, although Mr. Aiken testified that he got this impression from speaking to some people on the picket line. There is no evidence that Mr. Aiken or anyone else developed this idea from speaking to any member of the bargaining committee. Even if the Board accepts that in the early days of the strike there may have been some bravado among employees on the picket line, there is no evidence that this bravado persisted, nor that it was ever shared by the bargaining committee. Ms. Lesperance's continuing requests to return to bargaining belie the suggestion that the bargaining committee was not ready to resume bargaining. By early March Ms. Lesperance was prepared to meet under any conditions, and she so informed Mr. Wolfenden. By late March she was willing to consider sending the employees still on strike back to work, but the employer would not tell her what the working conditions were in the plant, and would not bargain. In all of the circumstances the Board is not satisfied that, for the entire period of January 9 to April 16, 1997, the employer could have reasonably believed that the bargaining committee's expectations were too high to resume bargaining.

79. Having reviewed the reasons for why the employer did not meet with the union for three and a half months of the strike the Board was not satisfied that PC World had demonstrated an intention to attempt to reach a collective agreement, nor that it had made any significant effort to return to bargaining. While the Board is sympathetic to the upheaval caused to the employer as a result of the strike, and while there may have been a period in which the employer was legitimately concerned about the problems on the picket line, there were weeks during the strike when PC World made no attempt to bargain in good faith to reach a collective agreement, as required by section 17 of the Act. From the evidence led it appears that the employer, having ascertained that it could operate without the striking workforce, chose not to heed the union's repeated overtures to return to bargaining.

80. Turning now to the employer's offer of April 18, 1997. A comparison of the employer's last offer on January 8, 1997 to the April 18 offer shows dramatic differences. However, it is not particularly helpful to compare the January 8th offer to the April 18th offer, because, as the union conceded, it had significant bargaining power in December 1996 and January 1997, when the employer was looking for stable financing for its operations and was prepared to buy labour peace. Thus, the January 8th offer reflects the union's enhanced bargaining power. The Board has therefore compared the previous collective agreement, a first collective agreement between these two parties, with what the employer was offering on April 18, 1997. After a three and a half month strike, the balance of power had clearly shifted to the employer, which had continued to operate its production uninterrupted, in a market that was improving.

81. As the Board recognized in *Shaw-Almex Industries Limited*, [1984] OLRB Rep. Oct. 1502, section 17 is not intended to redress any imbalance of bargaining power between the parties. Hence, hard bargaining does not necessarily amount to bad faith bargaining, if the bargaining is done in good faith, is not surface bargaining, and so long as the employer's terms are not so unreasonable as to suggest that in reality it does not want to reach an agreement with the trade union. The Board, in paragraph 69 of the decision in *Radio Shack*, [1979] OLRB Rep. Dec. 1220, stated:

... patently unreasonable contract proposals lacking any semblance of business justification may suggest an employer's desire to embarrass the union and encourage its abandonment by the employees. The legislation requires the parties to make every reasonable effort to make a collective agreement, a duty which patently unreasonable proposals fly in the face of.

82. In *Fotomat Canada Limited*, [1980] OLRB Rep. Oct. 1397, the Board recognized that it must be careful to avoid being used by a trade union to supplement its bargaining power, especially in the context of a prolonged strike. However, the Board indicated it must be cautious to ensure that hard bargaining does not have as its purpose the destruction of the trade union. In *Pine Ridge District Health Unit*, [1977] OLRB Rep. Feb. 65, the Board stated:

Similarly, the move to a position tailor-made for rejection would betray an intention not to conclude a collective agreement contrary to the duty imposed by section [17] of the Act. It follows, therefore, that while the parties may govern themselves by self-interest and may alter bargaining positions in response to changes in relevant conditions, a party which alters its bargaining position may leave itself open to the allegation that it is bargaining in bad faith. It falls to the Board in these cases to examine the evidence in light of the labour relations dynamics and draw the appropriate inferences.

83. The Board's review of the employer's April 18 proposal reveals a number of provisions in which the employer was seeking to significantly limit the benefits of seniority, or to limit access to the protection of the collective agreement. Compared to the parties' first collective agreement, in the proposal there was far increased discretion for the employer to transfer, promote, demote, layoff and recall employees, so that the concept of seniority would be severely undermined, and so that the employer's discretion would be largely unchecked. With the probationary period doubled, employees would not gain seniority for 130 days. The employer could transfer employees for 60 days without any

consideration of seniority or posting the position. When a vacancy is filled, any subsequent vacancies would be filled at the complete discretion of the employer. People could lose their earned seniority rights more easily and quickly.

84. The Board noted that proposals regarding the work which can be done by supervisors has been dramatically increased, so that there would be limited circumstances in which supervisors could *not do* bargaining unit work. In addition to all of the language changes the employer is seeking, it is also proposing to reduce the unpaid days employees could take for union courses, reduce significantly the shift premiums, reduce overtime pay provisions drastically to the minimum employment standard in Ontario, and to reduce the paid rest periods and wash up times. The impact of the latter two reductions would be that employees would be working for 20 minutes more per day without any more pay. Finally, the employer proposal would reduce half of the employees' wages to \$12 per hour, and would freeze the wages of those making under \$12 per hour. Only those who the employer picks in its exclusive discretion would be eligible to make the \$2 per hour premium rate for floaters and team leaders.

85. It was the employer's position that it had been financially negatively effected by the strike. It argued it had been under bankruptcy protection for two years, and only come out from under that protection at the end of April 1997. To be competitive it argued it needed the language it was proposing, and it argued further that the employer proposal was not designed to undermine the union, but was in recognition of PC World's need to be competitive when it is in a poor financial position. It was conceded that the proposal was concessionary, but the employer characterized the concessions as "modest", and a reflection of its improved bargaining position.

86. The Board had heard evidence of the employer's financial position in every quarter from the beginning of 1996. It would appear from the figures presented that from the second quarter of 1996 on, PC World had steadily increasing losses in each quarter, with operating losses of \$885,000 in the fourth quarter of 1996, and operating losses of \$1.1 million in the first quarter of 1997. However, Mr. Aiken testified that in the second quarter of 1997 PC World would likely do much better, either breaking even or showing a profit. Mr. Haskins had testified that productivity was up and better than ever. It is therefore clear that upon coming out of bankruptcy protection the employer was doing well, and that while it had sustained a loss in the first quarter of this year, when it is at full production, it is doing well. It is therefore difficult to see how the employer can maintain that it must, for financial reasons, seek the concessions it is seeking in its April 18 proposal.

87. In the context of ongoing negotiations between the parties the Board is of the view that it would be inappropriate to comment on any particular provision of the employer's proposal. However, in its overall review of the April 18 proposal, it appeared to the Board that the proposal suggested that the employer did not want to reach an agreement with the union and had tabled a proposal which was designed to undermine the union and any protections it could provide to employees in their employment relations. While it may be the case that after a relatively lengthy strike the employer has again experienced what it is like to operate without a trade union as the bargaining agent for employees, nonetheless, this trade union remains the bargaining agent for PC World employees. The employer is entitled to bargain hard in its enhanced bargaining position, but it is not entitled to embarrass the union or to table a proposal which seems designed for rejection by the union and its members.

88. I am bolstered in my view that the employer was trying to embarrass the union by the fact that despite numerous requests to bargain, the employer ignored the union bargaining committee. It then ignored the union representative when, in desperation, she asked to be informed of what the terms and conditions of employment would be if the striking employees returned to work. The employer appears to have wanted to signal to the employees that their union representatives could get them

nothing, and that if they wanted their jobs back, they would each have to come to the employer individually to beg for their respective jobs.

89. In a unionized workplace, even one in which there has been a long strike, it serves no labour relations or other purpose to embark on such a course of conduct. The Board has found here that PC World breached its duty to bargain in good faith by failing to meet with the union to bargain for a new collective agreement. The Board also finds that the employer, by tabling the proposal it did on April 18, 1997, breached its duty to bargain in good faith. However, since the Board does not wish to interfere in the process of collective bargaining, it did not order that the parties recommence negotiations with the January 8, 1997 proposal on the table. Clearly, after a lengthy strike of the sort experienced by these parties, positions will have changed, and the employer is entitled to exercise its increased bargaining power, so long as it bargains in good faith and without the purpose of the destruction of the union.

90. It was for all of the above reasons that the Board made the orders and directions it did in its decision of July 4, 1997.

1143-97-R United Steelworkers of America, Applicant v. Provincial Security Services Ltd., Responding Party

Certification - Representation Vote - Security Guards - Union applying to represent bargaining unit of 140 security guards working at 36 locations - Applicant asking for Board order directing employer to produce labels containing names and addresses of each person on voters' list so as to allow union to mail written materials to employees before holding of representation vote - Board making requested order and directing that costs associated with mailing be borne by union

BEFORE: *Lee Shouldice*, Vice-Chair.

APPEARANCES: *Jeffrey Sack* and *Brando Paris* for the applicant; *Brett Christen* and *Rocco Longhi* for the responding party; *Pierre Sadik* and *Frank Kelly* for Canadian Union of Professional Security-Guards.

DECISION OF THE BOARD; August 13, 1997

1. This is an application for certification. By way of decision dated July 14, 1997, a panel of the Board (differently constituted) determined that a representation vote ought not to be ordered in this proceeding until the timeliness of the application, and the validity of a voluntary recognition agreement entered into between the responding party and the Canadian Union of Professional Security-Guards, was determined by the Board. These issues came on for hearing before me on August 11, 1997.

2. At the outset of the hearing, counsel advised that the Canadian Union of Professional Security-Guards was withdrawing its intervention in this proceeding, and that the only remaining issues in dispute between the applicant and the responding party related to the taking of a representation vote. After a brief recess, the hearing resumed and all issues, with one exception, had been resolved between the parties. Argument was entertained on the remaining issue and the parties were advised that a decision would issue which would direct the representation vote and resolve the one issue remaining in dispute. This is that decision.

3. The issue that could not be resolved between the parties centres around the request of the applicant that it be provided with an opportunity to mail written materials to the employees of the responding party in such a manner that the addresses of those employees would not be disclosed. In essence, the applicant has requested that the process adopted by the Board in *Metropol Security Services*, [1993] OLRB Rep. Nov. 1154 be ordered by this panel of the Board. In that case, the Board directed that the employer produce labels containing the names and addresses of each person on the voters' list. A representative of the trade union was to attend at the offices of the employer with sealed envelopes containing the information to be communicated by the trade union and representatives of both parties were to label the sealed envelopes and arrange for the mailing of the information. All reasonable costs associated with the mailing of that information were to be borne by the trade union. Counsel for the applicant noted that there are 36 different buildings which are the workplaces for the voters in this proceeding, and that they are widely dispersed over the Greater Toronto Area.

4. Counsel for the responding party resisted the request by the applicant. In counsel's submission, such an order is extraordinary in nature, and the *Metropol Security Services* decision referred to above ought to be limited to its particular facts. Counsel noted that in *Metropol Security Services*, there were 1100 voters and over 200 worksites. Counsel noted that the applicant had been provided with a list of names of the employees, and that the responding party was prepared to provide the applicant with a list of the sites and site addresses where voters work. Counsel argued that to make such an order would provide the applicant with direct access to the employees of the responding party, at their homes, without their consent. Counsel referred to an endorsement of the Board in *North American Security Services Inc.* (Board File 1305-97-R, July 29, 1997, unreported), in which the majority of the Board was of the view that such intervention was unwarranted.

5. I have considered all of the submissions of counsel and I have carefully reviewed both of the authorities referred to above. I am of the view that the order requested by the applicant ought to issue in the circumstances of this case. There can be no doubt that the factual context of this proceeding (approximately 140 voters, with the voters working in 36 different buildings) is different than that which was before the Board in *Metropol Security Services*.

6. Here, though, there is an added dimension, one which was relied upon by counsel for the applicant in his reply to opposing counsel's argument. This application was filed with the Board on July 3, 1997. Normally, a representation vote would be ordered within 5 days of the application date. However, the applicant conceded that in the circumstances of this particular application a 5 day vote was not realistic. It was desired by the applicant that voting arrangements be made by the Board which would ensure a vote within two weeks of the application date. As a result of the intervention by the Canadian Union of Professional Security-Guards, a panel of the Board deferred the taking of a representation vote in order to resolve the issues I identified above. These issues have now been resolved. The result of all of this is, however, a month's delay in the ordering (and, ultimately, in the taking) of the representation vote.

7. Notwithstanding that time is of the essence in labour relations matters, it is true that Board proceedings can be (and are) delayed for various reasons. A month's delay in the taking of the representation vote in this proceeding could, in that context, be viewed as a not unexpected result. However, having reviewed the file, it is evident to me that the voluntary recognition agreement relied upon by both the responding party and the Canadian Union of Professional Security-Guards had no legitimate basis for its existence. It was not until late in the week before the hearing of this proceeding that counsel for the Canadian Union of Professional Security-Guards conceded that it had signed membership cards of only 11 out of the roughly 140 strong workforce at the time that the voluntary recognition agreement was signed. Based upon longstanding Board jurisprudence, the document said to be a voluntary recognition agreement could never have credibly established a bar to this application.

8. At the end of the day, the intervention filed by the Canadian Union of Professional Security-Guards has delayed the timely taking of the representation vote in this proceeding. In these circumstances, I am of the view that the applicant ought to be provided with the opportunity to send its materials to each of the voters on the voters' list. There is nothing that precludes the employer from doing the same - in fact, counsel for the responding party implied during the course of argument that his client would likely do so.

9. Accordingly, I make the same direction here that was made in the *Metropol Security Services* decision, referred to above. That is, I direct that the responding party forthwith cause to be produced labels containing the names and addresses of each of the persons on the voters' list. A representative of the applicant may attend at the offices of the responding party with sealed envelopes containing such information as the applicant wishes to communicate to the employees on the voters' list. Representatives of the responding party and the applicant shall together label the sealed envelopes and arrange for the mailing or distribution of such information. All reasonable costs associated with the mailing of such information shall be borne by the applicant.

10. The Board finds that the applicant is a trade union within the meaning of section 1(1) of the *Labour Relations Act, 1995*.

11. Having regard to the agreement of the parties, the Board further finds that:

all employees of Provincial Security Services Ltd. in the Regional Municipality of Metropolitan Toronto, the City of Mississauga, the City of Brampton, the City of Vaughan, the City of Oakville, the City of Aurora, and the City of Newmarket, save and except Mobile and Site Supervisors, persons above the rank of Mobile and Site Supervisor, office, clerical and sales staff, and persons for whom any trade union held bargaining rights as of July 3, 1997

Clarity Note: The parties agree that the sites with site supervisors as at the date of application are the following:

Sheridan College
Humber College
Centennial College

The parties further agree that shift supervisors are included in the bargaining unit

constitute a unit of employees of the responding party appropriate for collective bargaining.

12. It appears to the Board on an examination of the evidence before it that not less than forty per cent of the individuals in the bargaining unit proposed in the application for certification were members of the union at the time the application was made.

13. Having regard to the agreement of the parties as to the appropriate bargaining unit, the Board directs that a representation vote be taken of the individuals in the following voting constituency:

all employees of Provincial Security Services Ltd. in the Municipality of Metropolitan Toronto, the City of Mississauga, the City of Brampton, the City of Vaughan, the City of Aurora, and the City of Newmarket, save and except Mobile and Site Supervisors, persons above the rank of Mobile and Site Supervisor, office, clerical and sales staff, and persons for whom any trade union held bargaining rights as of July 3, 1997.

14. The vote will be held on August 25 and 26, 1997. Other vote arrangements will be as directed by the Registrar and set out on the attached Notice of Vote and of Hearing.

15. All individuals who had an employment relationship with the responding party in the voting constituency on July 3, 1997, the certification application filing date, are eligible to vote. Employees having an employment relationship on July 3, 1997, the certification application filing date, include employees who were not at work on that date, so long as there is a reasonable expectation of their return to employment.

16. The responding party is directed to post copies of this decision and of the "Notice of Vote and of Hearing" adjacent to the "Notice to Employees of Application for Certification". These copies must remain posted for 30 days.

17. Any party or person who wishes to make representations to the Board about any issue remaining in dispute which relates to the application for certification must file a detailed statement of representations with the Board and deliver it to the other parties, so that it is received by the Board within seven days (excluding Saturdays, Sundays and holidays on which the Board is closed) of the date on which the vote is taken.

18. The matter is referred to the Registrar.

1726-96-M Canadian Union of Public Employees, Local 1287, Applicant v. The Regional Municipality of Niagara, Responding Party

Duty to Bargain in Good Faith - Interim Relief - Remedies - Unfair Labour Practice - On eve of strike, employer unilaterally transferring seven bargaining unit positions outside of bargaining unit - Union filing unfair labour practice complaint and asking for interim order requiring employer to continue to recognize union as exclusive bargaining agent for the seven individuals holding the disputed positions - Board concluding that balance of harm weighing in favour of union - Application for interim order granted pending disposition or resolution of unfair labour practice complaint

BEFORE: *Gail Misra*, Vice-Chair, and Board Members *J. A. Ronson* and *R. R. Montague*.

APPEARANCES: *C. M. Mitchell* and *Steve Leavitt* for the applicant; *Roy C. Fillion*, *Christopher M. Little*, *John Nicol*, *Susan Reid*, *Jim Hagar* and *Scott Sanders* for the responding party.

DECISION OF VICE-CHAIR GAIL MISRA AND BOARD MEMBER R. R. MONTAGUE;
August 27, 1997

1. This was an application for an interim order brought by the Canadian Union of Public Employees, Local 1287 ("CUPE" or the "union"), relying on the provisions of section 98 of the *Labour Relations Act, 1995* (the "Act"). It was heard on September 19, 1996. The majority of the Board (Board Member Ronson dissenting) issued a short decision on September 20, 1996, granting in part the interim order requested, and indicating that the Board's reasons would follow at a later date. These are the reasons for our decision.

2. In reaching our decision we relied upon the pleadings of the parties, the declarations submitted in support of the pleadings, and the oral submissions of counsel. For the purpose of providing context, what follows is a recitation of the relevant facts pleaded.

3. CUPE represents approximately 670 inside and outside workers in seven regional departments or offices in the Regional Municipality of Niagara (the "Region" or "employer"). A collective agreement between the union and the employer expired on March 31, 1996. The parties exchanged collective agreement proposals on May 10, 1996, and then between May and July, 1996 negotiated the approximately 70 proposed amendments each of them wanted to the collective agreement. On July 10th the parties reached a tentative agreement, and on July 12, 1996, they signed a Memorandum of Settlement.

4. The Region, in the course of bargaining, had proposed an amendment to the recognition clause of the collective agreement such that two existing bargaining unit classifications, Supervisor of Social Services and Senior Clerk-Social Assistance, would be excluded from the bargaining unit. The Region employs six Supervisors of Social Services and one Senior Clerk-Social Assistance. The Supervisors of Social Services apparently supervise 77 caseworkers with an annual case load of approximately 9,100 cases. The Senior Clerk-Social Assistance supervises the office and administrative staff in the Social Assistance Division of the Region. The status of these classifications had been discussed by the parties on a number of occasions over at least the past ten years.

5. In November 1988 the employer applied to the Board under what is now section 114(2) of the Act to have the employee status of the Social Services Supervisors, among others, determined. The union apparently objected to the exclusion of the individuals in these positions from the bargaining unit. On March 30, 1989 Board Officer Examinations commenced, however on March 31, 1989 the employer withdrew its application. Since that time, it is suggested, the Region has not applied for a determination of the employee status of the persons in either of the two classifications.

6. As a result of the negotiating in this round of bargaining, in addition to all of the other matters dealt with, the parties agreed upon the exclusion of the Supervisor of Social Services and Senior Clerk-Social Assistance classifications from the bargaining unit. The Memorandum of Settlement was subject to ratification by the union members, and was put to a vote on July 31, 1996.

7. On July 31, 1996, Syd Ryan, President of the Ontario Division of the Canadian Union of Public Employees, Michael Stokes, the Ontario Municipal Employees Coordinating Committee Coordinator and a National Representative of the union, and Joe Bouchard, Acting Assistant Regional Director of the union, attended the ratification meeting and discouraged the union's members from voting to ratify the Memorandum of Settlement. None of these individuals had been on the union's negotiating committee. The result of the ratification vote was that a majority of the membership voted to reject the Settlement.

8. On August 6, 1996 the parties met with a conciliation officer, and on August 29, September 13 and 14, 1996 they met with a mediator. The union held a strike vote on August 14, 1996, at which time the majority of the union membership voted in favour of a strike. A "no board" report was issued on August 15, 1996.

9. The Region claimed that at no time subsequent to the July 31, 1996 ratification vote did the union specifically refer to the issue of excluding the Supervisor of Social Services and the Senior Clerk-Social Assistance classifications from the bargaining unit. It was therefore the Region's view that this was not a strike issue. The union denied the Region's contention, and claimed that the status of these positions was explicitly raised at every meeting the parties had from the time that the membership rejected the tentative agreement. At the first meeting after the ratification vote, on August 6, 1996, the union claimed it gave the employer written proposals outlining its position, including a position that there would be no additional exclusions.

10. The union also claimed that at that meeting a representative of the union took the employer representatives through all of the union's proposals, including that it was not agreeing to the exclusion of any positions from the bargaining unit. In later discussions the union alleged it continued to reiterate its position regarding Article 3.01.

11. By a letter dated August 30, 1996 the Region advised the union that the Niagara Regional Council had resolved to implement the terms of the Memorandum of Settlement unilaterally if there was no settlement prior to September 1, 1996. On that day the Region also informed the Supervisors of Social Services and the Senior Clerk-Social Assistance that it wanted to meet with them on September 3, 1996 to discuss the status of these classifications in light of the Council resolution.

12. On the morning of September 3, 1996 the union informed the Region it would be commencing its strike at 12 noon that day. On the same morning representatives of the Region apparently met with the seven bargaining unit members who fill the two classifications in issue. These individuals were allegedly informed that their classifications were being transferred outside the bargaining unit. After the meeting the union was able to meet with these seven persons, and at that point was informed of the employer's plan. Shortly after the meeting between the seven bargaining unit members and the Region, and just prior to the strike commencing, representatives of the Region gave each of the seven employees a letter, the text of which follows:

During the course of recent negotiations, the parties agreed to transfer the positions of Social Services Supervisor and Senior Clerk to non-union status effective with the implementation of the collective bargaining. The Corporation, by direction of Regional Council, has implemented the terms and conditions of the Memorandum of Settlement agreed to by CUPE Local 1287 and the Region of Niagara on July 12, 1996, effective September 1, 1996.

Therefore, please be advised that your present position will be transferred to non-union status immediately. The parties agreed to the proviso that an offer would be issued to the incumbents providing first right of refusal to the transferred position. In keeping with this agreement, you are hereby given notice that you have until 11:00 a.m. Tuesday, September 3, 1996 to accept or decline this transfer in writing. If you choose to accept this transfer it will take effect immediately. Conversely, if you choose to decline this transfer, you will be provided notice of layoff in accordance with the collective agreement. Please affix your signature and date the attached sheet, noting your acceptance or decision to decline this transfer.

Further details will be supplied through Mr. John Cooper. I trust he will be of assistance in answering your questions concerning the transfer of these positions. I will also be available to discuss this matter with you, and can be contacted at extension #607.

13. The union took the position that the letter was inaccurate since the Memorandum of Settlement had not been ratified so that it was incorrect to state that the union had agreed to the transfer of positions out of the bargaining unit, or that the union had agreed to any protocol. Since the Settlement had been rejected, there was no longer any agreement in place. All seven employees allegedly accepted the transfer out of the bargaining unit. The strike commenced at 12 noon on September 3, 1996.

14. It is noteworthy, although not surprising, that neither the Region nor the union had a declaration from any of the affected employees. The union filed the declaration of Steve Leavitt, the president of the Canadian Union of Public Employees, Local 1287. According to his declaration, these seven employees had been driven across the picket line daily in car pools. No bargaining unit members, other than these seven individuals, had crossed the picket line to attend work. The union asserted that some of these persons were union officers, stewards, or chairs of union committees, so that they had been put in a difficult position as a result of the employer's ultimatum. In addition, it was asserted that these seven bargaining unit members had been prevented from participating in the strike and joining

their fellow bargaining unit members on the picket line. The union believed these persons were having to do bargaining unit work.

15. It was asserted that the consequences of the employer's action were significant for both the union and the individuals concerned. The affected employees were being prevented from exercising their right to strike and to engage in lawful picketing activity. They had been threatened with the loss of their jobs if they had not exercised the employer's option of leaving the bargaining unit prior to the commencement of the strike. By performing bargaining unit work, Mr. Leavitt asserted that the union's ability to mount a successful strike was undermined.

16. He and other bargaining unit members on the picket line found it upsetting that bargaining unit employees were being taken across the picket line, and it was his opinion that the act of taking these seven employees into work was undermining morale on the picket line. The unilateral exclusion of employees from the bargaining unit also undermined the morale of the union's membership. Finally, it was Mr. Leavitt's belief that an interim order would not adversely affect the employer in any way as the positions in question had been in the bargaining unit for as long as anyone could recall.

17. John S. Nicol, the Director of Human Resources for the Region, made a declaration in support of the Region's response. He asserted that the seven affected employees wished to have their bargaining unit status clarified before the strike commenced, and that they considered themselves to be management. Mr. Nicol asserted that the seven employees were not pressured to accept the transfer out of the bargaining unit and had not been forced to cross the picket line. Finally, Mr. Nicol believed that denying the union's application for interim relief would not undermine the union's ability to engage in a lawful strike. There was nothing in Mr. Nicol's declaration regarding any possible harm which the Region may suffer if an interim order in favour of the union was made.

ARGUMENTS

18. Since the parties made reference to provisions of the *Labour Relations Act, 1995* (the "Act") and the *Statutory Powers Procedures Act* ("SPPA"), for ease of reference, section 98 of the Act and sections 16.1 and 32 of the SPPA are reproduced below:

Labour Relations Act, 1995

98. (1) On application in a pending proceeding, the Board may make interim orders concerning procedural matters.

(2) The Board shall not make an order under subsection (1) requiring an employer to reinstate an employee in employment.

Statutory Powers Procedures Act

16.1 (1) A tribunal may make interim decisions and orders.

(2) A tribunal may impose conditions on an interim decision or order.

(3) An interim decision or order need not be accompanied by reasons.

32. Unless it is expressly provided in any other Act that its provisions and regulations, rules or by-laws made under it apply despite anything in this Act, the provisions of this Act prevail over the provisions of such other Act and over regulations, rules or by-laws made under such other Act which conflict therewith.

19. The parties made submissions about whether or not the Board had the jurisdiction to grant the interim order requested. The union argued that pursuant to section 98 of the Act the Board had the jurisdiction to provide interim relief of the sort requested here. In the alternative, the union argued that pursuant to sections 16.1 and 32 of the SPPA, the Board had the power to grant interim relief.

20. The union argued that the test the Board should apply in deciding whether to grant interim relief in this application was to consider whether the union had an arguable case for the remedy requested, and if so, the Board should consider the potential harm of either granting or not granting the relief sought (see *Loeb Highland*, [1993] OLRB Rep. March 197, and *Tate Andale Canada Inc.*, [1993] OLRB Rep. Oct. 1019).

21. The employer took the position that section 98 of the Act limited the Board's power to make interim orders on purely procedural matters, as opposed to substantive matters. With respect to the application of the SPPA, the Region argued that there was no conflict between section 98 of the Act and section 16.1 of the SPPA, but rather, section 98 qualified the effect of section 16.1 by indicating that the Board's jurisdiction to make interim orders was limited to making interim orders with respect to procedural matters. Since there was no conflict, it was argued, section 32 of the SPPA did not apply. Further, since the issue in this case was not of a procedural nature, it was argued that the Board should not make the order requested.

DECISION

22. In the recent past the Board has issued its reasons in two applications for interim orders in which it has considered the arguments that both section 98 of the Act and sections 16.1 and 32 of the SPPA allow the Board to make interim decisions about any matter, procedural or substantive (*The Crown in Right of Ontario Represented by Management Board of Cabinet*, [1996] OLRB Rep. Sept./Oct. 780, and *International Brotherhood of Electrical Workers*, [1996] OLRB Rep. Sept./Oct. 821). Both of those cases had been argued and decided before the case before this panel came on for hearing, however, the reasons had not issued. Since the arguments made in those cases were similar, if not the same in some areas, as those made in the case before this panel, we have adopted portions of the Board's reasoning in this decision.

23. In *The Crown in Right of Ontario* the Board reviewed the legislation dealing with interim relief in Bill 40 (section 92.1 of the previous Act), noted the subsequent passage of sections 16.1, 17 and 32 of the SPPA, and the repeal of Bill 40 by Bill 7, which removed section 92.1 from the Act and enacted section 98. As the Board noted in that decision, nowhere in the Act is there a provision that section 98 applies despite anything in the SPPA.

24. In paragraphs 15 to 31 of that decision the Board addressed the question of its jurisdiction under section 98 of the Act. It is unnecessary to reproduce those paragraphs here, however, the majority of this panel is in agreement with the Board's analysis in that case, and with the conclusion reached in *The Crown in Right of Ontario*. Thus, we agree that, in enacting section 98, the Legislature intended that the Board only issue interim orders dealing with "procedural matters" regarding the conduct of a proceeding and related matters.

25. The Board in *The Crown in Right of Ontario* also addressed the Board's jurisdiction under the SPPA. At paragraphs 33 to 40 the Board stated:

33. As will be seen, section 16.1 gives all tribunals to which the SPPA applies, an independent authority to make interim decisions and orders; moreover, pursuant to section 32, should there be any conflict between provisions of the SPPA and other provincial statutes, the provisions of the SPPA are to prevail (in this regard, see *Thompson and Lambton County Board of Education*, [1972]

3 O.R. 889, upheld on appeal at [1973] 1 O.R. 766). Section 110(21) of the Act (newly enacted in Bill 7) is an example of such “override”:

110. (21) Rules made under subsection (18) apply despite anything in the *Statutory Powers Procedure Act*.

34. There is no dispute that the provisions of the *SPPA* apply to the Board, unless explicitly exempted in the *Labour Relations Act, 1995*, as was done in section 110(21). OPSEU and AMAPCEO thus argue that the effect of any limitation on interim powers contained in section 98 of the Act cannot stand in the face of the generally unlimited jurisdiction to grant interim relief granted to tribunals, such as the Board, in section 16.1 of the *SPPA*. Section 16.1 overrides or subsumes any limitations on interim powers in section 98. The Legislature must be taken to have been aware of the *SPPA* at the time it passed Bill 7, submit OPSEU and AMAPCEO, both because of the general presumption to this effect, and because the new section 110(21) it enacted explicitly recognizes the *SPPA*, and states that certain rules made under section 110 are to apply “despite anything in the *Statutory Powers Procedure Act*.” It must follow, they argue, that the *Labour Relations Act, 1995* was passed with an actual awareness of the content and meaning of the *SPPA*.

35. One of the Crown’s arguments in response is that section 16.1 of the *SPPA* only deals with “procedural” powers, only granting tribunals the authority to make interim orders of a “procedural” or “process” nature. This argument replicates the Crown’s argument as to the meaning of the word “procedural” in section 98 of the Act.

36. However, the word “procedural” is not found in section 16.1 of the *SPPA*, and as with the *Labour Relations Act, 1995*, there are found elsewhere in the *SPPA* specific “process” powers. To read the unrestricted “interim” power in section 16.1 as so limited would render the section largely redundant. As well, section 16.1(2) empowers a tribunal to “impose conditions on an interim decision or order”. It appears even less likely that the “interim orders” envisaged in section 16.1 were only of a “process” nature, given this explicit power to attach conditions to such orders. This linkage suggests orders of a more significant nature than merely running a hearing. We note also that section 16.1 authorizes the making of interim “decisions”, not only “orders”, further buttressing the argument that a tribunal can make substantive decisions on an interim basis under section 16.1.

37. On balance, it appears to us that section 16.1 of the *SPPA* gives jurisdiction to tribunals, including this one, to make decisions or orders on an interim basis that relate to or derive from the tribunal’s general or overall jurisdiction. Provided the tribunal acts generally within its jurisdiction, it has a largely unfettered discretion to make interim “decisions or orders” that it has the jurisdiction to make on a final basis, after a hearing on the merits, or that it considers necessary in order to ensure that the statutory rights it deals with are protected until a final decision issues.

Reconciling section 98 of the Act and section 16.1 of the SPPA

38. Given this conclusion, the Board’s powers granted under section 16.1 of the *SPPA* would appear inconsistent with the far more restrictive interim powers granted under section 98 of the Act. The two cannot stand together, and do not merely overlap. The former grants a general jurisdiction to grant interim orders, while the latter grants the authority to make interim orders that deal with the conduct of the proceeding only.

39. Since there is an inconsistency between the two statutory provisions, we must have resort to section 32 of the *SPPA*, the override provision. While the application of that section does not depend on awareness of its content, it must be taken that the Legislature was fully cognizant of the *SPPA* and its override provisions, since it explicitly exempted the application of the *SPPA* in section 110(21) of the Act. The Legislature did not, however, direct that the provisions of section 98 of the Act were to apply despite the *SPPA*. Under section 32 of that Act, therefore, the provisions of the *SPPA* (here, section 16.1) prevail over the provisions of the *Labour Relations Act, 1995* (section 98), since the two provisions conflict.

40. We conclude in the result that the Board has a general power to grant interim orders, as long as the orders are within or relate to the Board’s general jurisdiction.

26. The majority of this panel agrees with the analysis and conclusions outlined above, and is of the view that provided that the Board is acting within its general jurisdiction, it has the power and discretion to make interim decisions or orders. (See also *International Brotherhood of Electrical Workers*, cited above, wherein the Board reached the same conclusion, although a slightly different analysis was undertaken in that case.)

27. The approach the Board will take in its consideration of applications for interim relief under the SPPA is outlined in *The Crown in Right of Ontario* as follows:

49. Nevertheless, we consider it appropriate to exercise our jurisdiction in this area in a manner similar to the the [sic] approach previously utilized by the Board. Although our authority now derives from a statute of general application, the general interim power granted to the Board, and other tribunals, through the SPPA, is in our view a plenary authority to make interim orders that are related to the tribunal's constituent statute, and the rights, obligations and duties contained therein.

50. The SPPA does not give a tribunal a general inherent power to make interim orders of any nature and for any purpose. It gives an interim power that is not defined within the SPPA, but which must be exercised in a manner responsive to and with a view towards the purpose, function and powers of the tribunal in question, as defined by the statutory enactment setting up or regulating the tribunal. It is still to the *Labour Relations Act* (now the new Act) that the Board must look to give it guidance as to how it ought to exercise any interim relief powers that it might have. This remains true where the power itself is granted elsewhere. The defining of and the parameters of that power reside in the *Labour Relations Act*, 1995.

The Board in *International Brotherhood of Electrical Workers*, cited above, also observed that section 16.1 of the SPPA is written in the same broad language as section 98.1 of the Bill 40 version of the Act, so that there is no apparent reason for the Board to approach interim applications differently from the way it did previously.

28. The two-pronged test the Board has applied in interim relief applications is:

- a) Assuming the applicant's assertions to be true, is there an arguable breach of the *Labour Relations Act*, 1995 for which there is a remedy which the Board is arguably empowered to give?
- b) If so, does the balance of labour relations harm favour the granting of interim relief?

The initial onus is on an applicant for interim relief to satisfy the Board that interim intervention is appropriate, and to do so the applicant must plead an arguable or *prima facie* case. The applicant must then establish that interim relief is appropriate because it will suffer some substantial labour relations harm unless the Board intervenes pending the disposition of the application on the merits. The Board must also consider the responding party's assertions of harm, to see whether there is any countervailing labour relations harm which makes interim relief inappropriate. A flexible approach should be taken to the two-pronged test so that appropriate labour relations results may be achieved based on the particular circumstances of each case. (See *Ombudsman Ontario*, [1994] OLRB Rep. July 885 and *Westbury Howard Johnson Hotel*, [1994] OLRB Rep. Aug. 1166).

29. We agree with the Board's comments in *The Crown in Right of Ontario*, cited above, that the Board should consider the specific remedy sought, that an interim order is an extraordinary remedy which ought not to be granted without consideration of the appropriateness of granting such relief before a hearing on the merits, and that interim intervention may itself bring negative consequences for the parties' relationship.

* * *

30. The first question for the Board to address was whether there was an arguable breach of the *Labour Relations Act, 1995* for which there was a remedy which the Board was empowered to give? The union had alleged breaches of the following sections, and claimed that the employer, by its actions, had:

- a) imposed a condition in a contract of employment or proposed the imposition of a condition in a contract of employment that sought to restrain the employees in question from exercising rights under the Act, contrary to section 72(b) of the Act;
- b) sought by threat of dismissal, or by other kind of threat, to compel the employees in question to refrain from continuing to be or to cease to be members of the trade union or to cease to exercise other rights under the Act, contrary to section 72(c) of the Act;
- c) violated the rights of members of the bargaining unit to exercise their rights under the Act in anticipation of, or during, a lawful strike, contrary to section 78(1) of the Act;
- d) sought by intimidation or coercion to compel the persons in question to refrain from continuing to be or to cease to be members of the trade union or to refrain from exercising other rights under the Act, contrary to section 76 of the Act; and,
- e) bargained in bad faith, contrary to section 17 of the Act.

31. On the basis of our review of the application and submissions, most of the salient portions of the merits of which have been outlined earlier, the union was seeking enforcement of the Act for alleged breaches of specific unfair labour practice provisions of the legislation. On its face the application made out an arguable case for the violations alleged. The union had pleaded facts suggesting that the Region's decision to unilaterally impose its position on the recognition issue with respect to the positions held by the seven employees in question, was a breach of the Region's duty to bargain in good faith at the commencement of a legal strike. The union also argued that the Region had denied the seven employees their right to be represented by the union, to continue to be members of the bargaining unit, and to participate in the legal strike. It was arguable that at least some of the Region's actions may be in breach of the sections of the Act that the union had alleged. As the Board has noted on many occasions, this first prong of the test is relatively easy to meet, and the majority was satisfied that in the circumstances of this application, the union had made out a *prima facie* case for the relief it was seeking.

32. The second question for the Board to address, if it finds that the applicant has made out an arguable case, is whether the balance of labour relations harm favours the granting of interim relief. Having found that the union had an arguable case, we turned to a consideration of the second question.

33. In this case the parties appeared to have initially reached an agreement, but the union membership failed to ratify that agreement. The parties then appeared to have bargained unsuccessfully just prior to the commencement of a strike. The employees of the bargaining unit had been out on strike for almost two weeks at the time of the interim relief application being heard. It appeared undisputed that at the time of the hearing no bargaining unit employee was crossing the picket line, except for the seven employees who the Region had purportedly transferred out of the bargaining unit. Those seven employees had apparently been considered by the union and the employer as part of the bargaining unit for as long as anyone could remember, even up until the day the strike commenced on September 3, 1996.

34. The union claimed that by unilaterally removing these people from the bargaining unit, on the day the strike commenced, the employer denied those employees the right to engage in a legal

strike. That right, it was argued, was a time sensitive one which would expire when the strike was over, so that whatever may transpire in the main application on the merits, if the strike ended in the interim, the particular employees involved may be deprived of their right to strike and to participate in the legal activities of the union during this crucial period. That harm could not later be rectified.

35. The union also argued that it would be harmed by the Region's unilateral decision to reduce the scope of the union's bargaining rights, which it was suggested had the immediate effect of undermining the union's ability to have all of its members engage in strike action. By having the seven employees working during the strike, the Region had pre-empted the strike's effectiveness.

36. According to the union, the employees in question had always been included in the bargaining unit, so to grant the union's application would not change what had been the prevailing situation up until the commencement of the strike, and hence, no harm would be caused to the employer. Also, the interim ruling would only be in place until such time as the merits of the section 96 application had been heard and decided.

37. The contents of the declaration of Steve Leavitt, the President of the union Local 1287, filed by the union in support of its application have been outlined above. He indicated that the morale of the striking bargaining unit members on the picket line was being undermined by seeing their erstwhile colleagues and fellow members being transported across the picket line. It was Mr. Leavitt's belief that morale was also being undermined by the Region's unilateral exclusion of employees from the bargaining unit. To the best of Mr. Leavitt's knowledge the seven affected employees were doing bargaining unit work for the employer, thereby further undermining the union's ability to mount a successful strike.

38. In support of the Region's response, Mr. Nicol stated his belief that the seven employees in question wished to be excluded from the bargaining unit, and that if the interim application was granted, those people would be forced to participate in the strike when they had no desire to do so. As has been noted earlier, no declarations in support of or opposed to the interim application were filed on behalf of any of the seven disputed individuals, so that the Board did not have the benefit of their views.

39. The responding party did not plead any harm which would accrue to the Region should the Board find in the union's favour nor did Mr. Nicol's declaration claim any. At the hearing counsel argued that the harm was that seven individuals would be deprived of being managers. It was also argued that the people receiving social assistance from the Region would be affected because there would be seven fewer people to provide them with services. The Region conceded that it could probably manage without the seven, but that its ability to provide services would be compromised. The Region argued that the union could not claim any harm because the seven people involved represented only 1% of the bargaining unit.

40. Having reviewed the documentation and considered all of the submissions on this issue, the majority was of the view that the balance of harm tipped in favour of the union. The majority was concerned that there had been no declaration filed by any of the seven affected employees. However, we are prepared to accept that the union is the bargaining agent for the employees in question and for all of the employees in the bargaining unit. While the seven employees in question only represented one per cent of the total bargaining unit, they represented the supervisory staff of 77 people on the picket line. As such, we were satisfied that it would be harmful to the morale of those people to see their colleagues and supervisors, and until the strike, their fellow union members, crossing the picket line daily. The majority was further of the view that by the employer's seemingly unilateral action, it had affected the solidarity of union members about to engage in a lawful strike. Since there were no other striking employees who were crossing the picket line to attend at work, all of the other employees

on strike would also have been negatively affected by the sight of erstwhile union members crossing the picket line and undermining an otherwise solid strike.

41. The majority was also concerned about the harm that was being caused to the union's ability to mount a successful strike by having bargaining unit members doing bargaining unit work. While this is not an entirely unusual event during a strike as some union members may choose to work and not to participate in the strike, it is unusual when these employees had not been given the opportunity to exercise their right to strike or not in the first place. To the extent to which they did have this opportunity, it is argued by the union that it was in the context of a threat to their ultimate job security.

42. On the other hand, the harm claimed by the Region was that the employees in question did not want to strike, and would be forced to join the picket line. As has been noted already, there is not a single declaration from any of the employees in question to this effect. In any event, it was the majority view that this alleged harm was one which accrued to the employees, if to anyone, and not to the Region.

43. The further harm claimed by the Region was that services would not be provided to families in the Niagara Region. Nonetheless, the Region suggested it could probably have managed without the seven individuals.

44. It was in light of these considerations that the majority was of the view that the balance of harm favoured the union as it was suffering tangible consequences as a result of the purportedly illegal action taken by the Region. Given that the strike was in progress, the majority was of the view that irreparable harm may result to the union should interim relief not be granted. The Region had unilaterally, and arguably without legal right, eliminated seven positions from the bargaining unit. To the striking bargaining unit, this may have seemed like a demonstration of the union's ineffectiveness, in that an employer could unilaterally exclude people from exercising their rights under the Act. The majority was also of the view that by returning the union to the position it was in just prior to the strike, the employees in question would be afforded their right to participate in the strike, or not. In the event that those people, or any one of them, wanted to work, as was suggested by the Region, they would be free to make that decision without the pressure of what had been alleged to be an ultimatum.

45. It was for these reasons that the majority granted the union some of the interim orders it was seeking and issued the order it did on September 20, 1996.

46. Board Member Ronson's dissent will follow in due course.

2842-96-R Unionized Employees of Tenaquip, Applicants v. Teamsters Local Union 419, Responding Party v. Tenaquip Limited, Intervenor

Termination - Board finding that employer permitted petitioners' activities and thereby contributed resources which were significant to facilitating termination application - Through its cooperation with and toleration of petitioners' activities, employer also communicated to employees its support for the application - Board finding that employer's contribution, made at an early or formative stage of the application, was significant and influential - Board satisfied that employer's conduct amounting to "initiation" of application within meaning of section 63(16) of the Act and dismissing application

BEFORE: *Bram Herlich*, Vice-Chair.

APPEARANCES: *Dave Hepworth* on behalf of the applicants; *N. L. Jesin* and *Paul Dunne* for the responding party; *Fred Von Veh*, *Lynn Maxwell*, *John Morrison* and *Graham Wells* for the intervenor.

DECISION OF THE BOARD; August 22, 1997

1. This is an application filed pursuant to section 63 of Labour Relations Act, 1995 (the "Act") seeking a declaration that the responding party (the "union") no longer represents employees in the relevant bargaining unit of the intervenor (the "company" or the "employer").

2. In its response to the application, the union asserted and filed particulars to support its claim that the employer or a person acting on behalf of the employer initiated the application or engaged in threats, coercion or intimidation in connection with the application. Consequently, the union asked that the Board exercise its discretion pursuant to section 63(16) of the Act and dismiss the application. It was these allegations and this request which formed the subject matter of the hearing held in this case.

3. The Board heard the evidence of 5 bargaining unit employees (3 of whom testified on behalf of the union; 2 for the applicant). There was little in the way of significant direct contradictions between the evidence of the union and that of the applicant. The employer chose to call no evidence.

4. As a great proportion of the evidence was neither directly disputed nor controversial, it is unnecessary to review it in minute and excruciating detail. A cursory summary of the salient details follows.

5. The two individuals most actively involved in the application were Dave Hepworth, a bargaining unit employee, and Ramsay Fraser. The union initially asserted that Mr. Fraser was a member of the employer's management team. However, while the differing evidence on this point may well establish that some bargaining unit employees believed Mr. Fraser to be managerial, any such conclusion is clearly mistaken. Indeed, although it continued to urge the Board to conclude that Mr. Fraser had acted on behalf of the employer, the union, at the conclusion of the hearing, no longer argued that he is managerial. Although Mr. Fraser did not testify, the evidence regarding his actual status is clear: he is a non-bargaining unit employee; his position is in sales; sales staff are excluded from the bargaining unit.

6. Mr. Hepworth testified that he sought out and secured Mr. Fraser's assistance at the earliest stages of events which culminated in the filing of this application. Mr. Fraser assisted in the preparation, production and reproduction of various documents prepared for the purposes of the application. He also helped to explain processes and materials Mr. Hepworth found confusing. Some two weeks prior to the signing of the petitions in this case, Hepworth and Fraser prepared, posted and distributed a notice addressed to "Tenaquip Union Employees" which read as follows:

"As you are all aware there is an attempt to decertify the union in our warehouse. The reasons for this are numerous and are open for discussion if any members would like to do so. Please contact Dave Hepworth or Ramsay Fraser if you would like to pursue [sic] this issue further.

Yours sincerely
Dave Hepworth
Ramsay Fraser"

7. Over the next two weeks Mr. Hepworth heard nothing and had no inquiries from any bargaining unit employees in response to the above notice. On November 29, 1996 Hepworth and Fraser solicited bargaining unit employees and all (but one) of the petitions filed in support of the application were signed. A brief description of the circumstances is in order.

8. The company's premises cover some 67,000 square feet which are divided into three main areas. By far the largest of these is the warehouse area in which the bargaining unit employees work. There is also a relatively small area which includes the store and store office. Finally, there is a sales and office area which includes the reception area, the cafeteria, various offices and sales areas. Included in a portion of this area which is also adjacent to the warehouse is the company's boardroom.

9. On November 29, 1996 Hepworth and Fraser summoned each member of the bargaining unit to the company boardroom and, in the resulting two on one individual meetings, presented them each with a petition to sign in support of this application. Eleven out of the fourteen bargaining unit employees signed (one of the petitions, however, is dated December 2, 1996). Mr. Hepworth estimated that he and Mr. Fraser spent 3-5 minutes in the individual meetings with each employee in the boardroom and agreed that the total amount of time they spent there was in the range of 45 minutes. All of the employees who testified indicated that they were summoned to the boardroom during their working hours. Mr. Hepworth was fairly certain that two of the employees (who did not testify) were summoned during their breaks.

10. Mr. Hepworth testified that he never sought the company's permission to use the boardroom for the purposes of soliciting signatures. He categorically denied that there was any "deal" between him and management. Neither Mr. Fraser nor anyone on behalf of the company testified as to what conversations may (or not) have transpired between them with respect to the initiation of this application. I also note the evidence of the applicant's other witness, James Camelo, who acknowledged that he would have assumed Hepworth and Fraser would have had the employer's permission to use the boardroom; he was also of the view that other employees would probably have made the same assumption.

11. The application was delivered to the union and the company and filed with the Board on December 3, 1996. Hepworth and Fraser took two hours off work that day for the purposes of delivering and filing the application. Hepworth testified that he neither gave nor was asked to provide any reason for his absence.

12. One final factual peculiarity is worthy of note. On file with the Board are 2 separate documents headed "Certificate of Delivery" and executed by employer representatives. One of these, signed by John Morrison, General Manager, raises some questions. Aside from being incomplete, it asserts that on December 2, 1996 (the day before the application was delivered to the employer) a completed copy of the intervention (including Schedule C - the list of bargaining unit employees) had been delivered to the applicant by the employer. Compounding some of this confusion is the fact that three separate employee lists have been filed with the Board. One accompanied the application filed on December 3, 1996. A second accompanied the employer's intervention filed December 9, 1996. The third, however, (which though not identical, bears a strong physical resemblance to the first) is unsigned and bears the same date stamp as the employer's intervention and Mr. Morrison's Certificate of Delivery.

13. Recent legislative change incorporated into Bill 7 has brought about some fundamental alterations to the processing of applications and the conduct of hearings in termination cases. Many of those changes have been described and commented upon in *Elirpa Construction and Materials Limited*, [1996] OLRB Rep. Jan. 4. The following passage of that decision is worth considering in detail:

8. As noted above, Bill 7 reflects a new point of departure for the Board, specifically with respect to applications for certification and for termination of bargaining rights. Historically, any bargaining unit employee who desired to terminate the bargaining rights of a trade union was required to apply to the Board for a declaration that the trade union no longer represented the employees in the bargaining unit. For such an application to be successful, it had to be supported by evidence in writing that not less than 45 per cent of the employees in the bargaining unit no longer wished to

be represented by the trade union. Significantly, the old Act, in section 58(3), required the Board to ascertain, amongst other things, whether those who had signified their desire to no longer be represented by the trade union had done so voluntarily. Only if the Board was satisfied that the written evidence in support of the application (typically referred to as a “petition”) was voluntary in nature was the Board authorized by the old Act to further satisfy itself, through the vehicle of a representation vote, that a majority of the employees in the bargaining unit desired to terminate the right of the trade union to bargain on their behalf.

9. As a practical matter, any employee who brought an application for the termination of bargaining rights was required by the Board to establish that the origination, preparation and circulation of the petition documentation supporting the application was free of actual or perceived management interference. In a typical proceeding, the proponents of the application would proceed to call their evidence first. They would be required to establish, on the balance of probabilities, that the origination of the petition document, its preparation, and its circulation were not in any way influenced by management, or the perception of management involvement. If the applicant or applicants could not clearly establish the voluntariness of the petition document for any reason, the application would not be successful. Actual employer involvement, perceptions by employees that the fact of their signing or not signing a petition could possibly be communicated to management, gaps in the custody of the petition, or a failure to explain the circumstances of the signing of any of the names on the petition document would usually lead the Board to doubt the voluntariness of the signatures on the petition document and dismiss the application.

10. Section 63 of the Act does not contain a provision such as that in the old Act which requires the Board to ascertain, prior to the ordering of a representation vote, that 45 per cent of the employees in the bargaining unit have voluntarily signified their desire to terminate the bargaining rights of their trade union. Instead, section 63 of the Act establishes a structure for the termination of bargaining rights which is centred on the taking of a representation vote shortly after the filing of an application for termination of bargaining rights. In essence, the provisions of section 63 of the Act require the Board in a typical case to direct the taking of a representation vote of the employees in the bargaining unit if it determines that 40 per cent or more of the employees in the unit “appear to have expressed a wish not to be represented by the trade union at the time the application was filed”. The determination made by the Board of the number of employees in the bargaining unit who appear to have expressed a wish not to be represented by the trade union is to be made solely by reference to information provided in the application and a list of names of the employees in the bargaining unit who have expressed a wish not to be represented by the trade union which is to be filed by the applicant. Quite simply, at this early stage of the process, the Act does not anticipate an inquiry into the voluntariness of the documentation supporting the application. In the typical case, if it appears to the Board that 40 per cent of the employees in the bargaining unit have expressed a wish to not be represented by the trade union, a representation vote is to be directed by the Board.

11. The Act does, however, anticipate that a hearing may be necessary to dispose of a termination application. There may well be numerous issues relating to the application which will require a hearing to resolve. One of the issues may be the effect of employer misconduct in connection with the application.

12. In that regard, reference must be had to the terms of section 63(16) of the Act. This provision, which was not present in the first reading version of Bill 7, provides as follows:

Despite subsections (5) and (14), the Board may dismiss the application if the Board is satisfied that the employer or a person acting on behalf of the employer initiated the application or engaged in threats, coercion or intimidation in connection with the application.

The question which arises on the facts of these applications is whether this provision confirms the Board’s historical practice; i.e. that an applicant in a termination proceeding must establish the voluntariness of the written documentation filed with the Board in support of the application, as described above.

13. On balance, I am satisfied that the Act does not anticipate that such an enquiry into the voluntariness of the origination, preparation and circulation of the underlying supporting documentation is to be undertaken by the Board. It is significant that the Act no longer requires the Board to

ascertain the voluntariness of the application or of the supporting materials filed with the application prior to the taking of the representation vote. Presumably, the direction by the Board that a representation vote be taken (within five days, excluding Saturdays, Sundays, and holidays, unless directed otherwise) will permit those voting to express their desires respecting trade union representation freely, without employer interference, and have the effect of "cleansing" any potential involuntariness of the nature which may have historically caused the Board some concern. Accordingly, I am of the view that it is no longer necessary for an applicant in a termination proceeding to establish that the wishes of those who have expressed a desire to terminate the bargaining rights of a trade union have been expressed "voluntarily", in the broad sense historically required by the Board. This conclusion is qualified, however, by the provisions of section 63(16) of the Act.

14. Section 63(16) of the Act anticipates that certain employer conduct will permit the Board to dismiss an application for termination of bargaining rights. Section 63(16) of the Act does not direct the Board to dismiss the application in all such cases, but rather provides the Board with the discretion to dismiss the application if it is satisfied that the employer or a person acting on behalf of the employer initiated the application, or engaged in threats, coercion or intimidation in connection with the application.

15. Argument was entertained from counsel respecting the meaning and scope of this provision. Counsel for Local 793 asserted that the provision should be read to require the applicant, in every termination application, to satisfy the Board that the application was not initiated by the employer (or an agent) or that the employer did not engage in threats, coercion or intimidation in connection with the application. Counsel conceded that such an inquiry would be somewhat more abridged than that typically engaged in under the old Act, but observed that to require the responding party to assert allegations of misconduct would put the responding party in a difficult position as it would often be the case that the trade union would be unaware of the events constituting improper employer initiation, threats, coercion or intimidation.

16. Although I have some sympathy with the practical difficulties alluded to by counsel for Local 793, I do not believe that the legislation anticipates that a hearing will be held in each and every case in order for the applicant to establish that the application was not initiated by the employer, and that there were no employer threats, coercion or intimidation in connection with the application. A petitioning employee may well be (but need not necessarily be) just as ignorant about employer threats, coercion or intimidation against other employees as the trade union may be about that same conduct. To require an applicant in each application to positively establish a lack of employer threats, coercion or intimidation with respect to each person who supports the application may well be impossible; realistically, the best the applicant could do would be to call evidence to establish that, to the best of his or her knowledge, no such employer conduct was communicated to him or her. Although this same difficulty is not apparent with respect to the statutory prohibition on employer initiation, there is questionable utility in convening a hearing solely for the purpose of hearing the applicant testify as to whether the application was his or her idea.

17. As a practical matter, the circumstances described by section 63(16) of the Act appear to warrant reference to the old adage that "he who asserts must prove". In my view, the Board should only convene a hearing to deal with the possibility of employer initiation or employer threats, coercion or intimidation in connection with the application should the responding party or an intervenor make allegations of such conduct. The allegations of misconduct should be pleaded in such a manner as to establish a *prima facie* violation of section 63(16) of the Act. This level of particularity of pleading may be, as was pointed out by counsel for Local 793, difficult in some circumstances, and it may well be that enquiries will have to be made by trade union representatives in receipt of termination applications to satisfy themselves that no employer wrongdoing has occurred. This is not meaningfully different from the type of investigation trade unions regularly engage in when ascertaining whether other sections of the Act have been violated by an employer. However, it is insufficient, in my view, to merely plead in response to an application for termination of bargaining rights that the employer initiated the application, or engaged in threats, coercion or intimidation in connection with the application, and then require the applicant to disprove those bald allegations at a hearing. If the trade union wishes to assert that section 63(16) of the Act applies to the application, it must particularize those allegations with some degree of specificity, and it must be prepared to attend at the hearing and call evidence to support its allegations.

14. Much of that general procedural description applies directly to the instant case. The Board (differently constituted) reviewed the union's allegations and pleadings and directed that the matter be listed for hearing to inquire into whether the application ought to be dismissed pursuant to the Board's discretion under section 63(16). The pleadings in this case asserted that a named member of management had been directly responsible for circulating and soliciting employee signatures on the various petitions filed in support of the application.

15. The resulting hearing before me was not one in which the applicant was initially required to call evidence to establish the "voluntariness" of the petition in the fashion that was required prior to the recent amendments. Indeed, although the union argued that other parties ought to proceed with their evidence first, the Board ruled that the union, as the party asserting the type of conduct contemplated by section 63(16), call its evidence first. And while there may be some overlap between the two issues, we are not concerned, per se, with the voluntariness of the petition, but rather with whether the employer or its agent has initiated or engaged in threats, coercion or intimidation in connection with the application.

16. The specific nature and meaning of the conduct contemplated by section 63(16) has been considered in the recent case of *Bytown Electrical Services Ltd.*, [1996] OLRB Rep. Sept./Oct. 721. In that case the Board offered the following:

107. There is a difference between the notion of "voluntariness" which was relevant to petitions signed before the passing of Bill 7, under previous versions of the Labour Relations Act, and the provisions of section 63(16) of the Act. The provisions under the repealed Bill 40, read as follows, at section 58(3):

Upon an application under subsection (1) or (2), the Board shall ascertain the number of employees in the bargaining unit at the time the application was made and whether not less than 45 per cent of the employees the bargaining unit have voluntarily signified in writing at the time that is determined under clause 105(2)(j.1) that they no longer wish to be represented by the trade union, and, if not less than 45 per cent have so signified, the Board shall, by a representation vote, satisfy itself that a majority of the employees desire that the right of the trade union to bargain on their behalf be terminated.

[emphasis added]

The current provision is contained in subsection 63(16) of the Act:

Despite subsections (5) and (14), the Board may dismiss the application if the Board is satisfied that the employer or a person acting on behalf of the employer initiated the application or engaged in threats, coercion or intimidation in connection with the application.

The voluntariness of the petition is no longer the crucial consideration for determining the validity of a petition. Bearing in mind that the union only weakly advanced the contention that Bytown or Mr. Boyd "engaged in threats, coercion or intimidation in connection with the application", the issue to determine [is] whether the decertification application was in fact initiated by the employer or a person acting on behalf of the employer. That is not the same determination as had to be made previously. There has been a shift of onus. The union must now establish that the application has been initiated by the employer, rather than the petitioners having the overall burden of proving the voluntariness of their petition. That is not the only difference. The notions of 'voluntariness' and the absence of 'employer initiation' are not necessarily coterminous or coincidental. Furthermore, the point of consideration by the Board is different as between its former determination of 'voluntariness' and its current consideration of the application of section 63(16) of the Act. The inquiry into voluntariness focused upon the circumstances of the signing of a petition, the current inquiry focuses upon the launching of the application. The focus is not restricted to the signing of the petition and includes the bringing of the application. In most cases this will be a distinction without a difference, but in some it may be significant.

108. Under subsection 63(16) of the Act, if a termination application is initiated by the employer, the Board has a discretion to dismiss it. The reason for this provision is that if a decertification application is really caused by or originated by the employer, and it is not primarily the conception of the employees who make the application, then it represents an improper interference by the employer in an area which should properly be within the exclusive terrain of the employees. Initiation involves causing, originating or facilitating, the beginning of a process or event. What meaning should the concept, 'initiation', be given in the context of section 63 of the Act? Plainly if an employer prepares a petition to terminate a union's bargaining rights, summons his/her employees and requires them to sign the petition and then requires an employee to initiate a termination application, the employer initiates the decertification application. But that is an extreme and, hopefully, rare manifestation of improper employer interference in the contemplated process of employees freely deciding of their own initiative that they no longer wish to be represented by a particular, or perhaps any, trade union. Such direct, palpable initiation will in all likelihood be an unusual occurrence. But initiation can also occur indirectly, less palpably than in the example suggested, though no less effectively. There are gradations of employer conduct in relation to a termination application, along a spectrum, part of which will be improper and part of which will be acceptable behaviour. The Act determines that when an employer "initiates" a termination application, the Board has a discretion to dismiss the application. There is a continuum of employer conduct, some of which will amount to 'initiation' some of which will not. How then is the distinction to be drawn?

109. We consider that the proper interpretation of the notion of "initiation" is to determine whether the employer's conduct amounted to significant or influential employer involvement giving rise to the termination application. In other words, if the application is founded in the conduct of the employer, then it can reasonably be concluded that the employer has initiated that application.

17. A brief summary and synthesis of the Board's approach in the above cases may be useful.

18. There will no longer be a hearing as a matter of course to inquire into the voluntariness of petitions filed in support of a termination application. Unions should no longer anticipate the holding of such a hearing or any "automatic" opportunity to subject the applicant to cross-examination or to otherwise put the applicant to the proof of establishing such voluntariness.

19. More specifically, and perhaps more significantly for our current purposes, applicants are no longer typically required to persuade the Board that (even mistaken but reasonable) employee perceptions of management involvement in a termination application have not undermined the voluntariness of a petition. Generally speaking, the Board is now concerned with actual not perceived employer involvement in termination applications.

20. Consequently, the vast majority of termination applications (which are timely and demonstrate the requisite apparent support) will now be determined by way of a representation vote. Indeed, there is no question that this typifies the Board's experience under Bill 7.

21. There remains, however, a residual category of termination cases where a hearing may be required, namely when the trade union alleges that the employer "initiated the application or engaged in threats, coercion or intimidation in connection with the application". That simple assertion, however, will not result in a hearing unless the union also pleads specific particularized facts disclosing a *prima facie* case of some section 63(16) conduct.

22. Where such a hearing is held and although the Board clearly has a discretion to direct otherwise, the union, in view of the onus it now bears, will typically be expected to call its evidence first. By its very nature, (the hopefully rare instances of) covert employer initiation of a termination application is unlikely to be an easy matter for a union to affirmatively and directly establish. And while the onus is clearly upon the union, the Board does recognize that circumstantial evidence may be sufficient to lead to an inference of improper employer involvement. An employer who chooses to call no evidence in the face of such circumstantial evidence obviously does so at its peril.

23. It is also useful to consider why, from a labour relations policy perspective, employer initiated termination applications under section 63 are to be viewed with considerable scepticism. An obvious explanation was adverted to in the *Bytown* decision (cited earlier) which described such conduct as an “improper interference in an area which should properly be within the exclusive terrain of the employees”.

24. There are two independent aspects to this explanation. First, the choice of whether or not to be represented by a trade union is and ought generally to be a collective and exclusive choice of affected employees. On that basis, employer interference in such a choice may well be improper.

25. But there is another and, for our current purposes, perhaps more significant aspect to the impropriety of employer involvement in termination applications.

26. This Board has historically been acutely sensitive to the delicate and responsive nature of the employment relationship. As the Board observed over four decades ago in the oft cited case of *Pigott Motors*, 63 CLLC 16,264:

In view of the responsive nature of his relationship with his employer and of his natural desire to want to appear to identify himself with the interests and wishes of his employer, an employee is obviously peculiarly vulnerable to influences, obvious or devious, which may operate to impair or destroy the free exercise of his rights under the Act.

27. The Board went on in that case to cite this concern and the fact that, in the Board’s experience, employers in a “not inconsiderable number of cases” had improperly inhibited or interfered with the free exercise of employee rights as the basis for the Board’s former practice of requiring applicants to establish the voluntariness of petitions.

28. Does the fact that the Board will no longer, as a matter of course, conduct an inquiry into the voluntariness of a petition, mean that all of the Board’s historical concerns about the impropriety of employer involvement in termination applications have now completely dissipated? Clearly not. Such conduct may still amount to a violation of section 70 of the Act and improper employer involvement in a termination application may lead to the dismissal of the application under section 63(16).

29. In the context of this framework of law and policy, I turn now to the conclusions to be drawn from the evidence in the instant case.

30. It is clear that signatures on the petitions were solicited during working hours; employees were summoned to leave their work areas and to attend at the boardroom for the purposes of a series of short individual meetings. The two lead petitioners spent a cumulative total of close to an hour each away from their work duties. Each of the employees spent up to 5 minutes attending in the boardroom in addition to the time travelling to and from the boardroom. The petitioners’ open and notorious approach to the solicitation of petition signatures may have created something of a parade appearance for any observer.

31. But how are we to characterize the employer’s involvement in the process? There is certainly no direct evidence before us of any employer involvement in the initiation of the application. Does that end the matter? Not in the circumstances of this case.

32. In the absence of any evidence to the contrary, it is exceedingly difficult to come to any conclusion other than the employer was, at an absolute minimum, aware of the activities of Hepworth and Fraser and aware that they were using the company boardroom and its working time to further their efforts at decertification. In this regard, even accepting Mr. Hepworth’s denial of having sought the company’s permission to use the boardroom does not alter our conclusion. It would have been extremely

difficult and highly unlikely for the petitioners to have successfully insulated their activities from management view. No special precautions were taken by the two petitioners who seemed to have ready, easy and open access to all sorts of employer resources (from fax machines to addresses to the boardroom and employees during working hours). Finally, while we have Mr. Hepworth's denial in relation to his own conduct, we have no evidence from either Mr. Fraser or from any company representative to shed any light on the company's knowledge or conduct.

33. Thus, I am satisfied that the employer was aware of the petitioners' activities and their open use of company resources in furthering the application.

34. But awareness of employee utilization of company resources and even the tacit employer support for the application that goes with that awareness may not, by themselves, be sufficient to conclude that the company has initiated this application. Rather, before concluding that an application was employer initiated, one would typically expect to characterize that employer's conduct as an early and material involvement in or giving rise to or otherwise significantly facilitating the application.

35. In determining whether the employer's conduct in this case amounts to initiation, it is necessary to consider not only the nature but also the likely effects of that conduct. Indeed, it is critical to underscore the use and effect to which the company's resources were put in furthering the application. This is not a case where a company clipboard is used to hold the petition or even one where the petitioners surreptitiously solicit signatures in the workplace during working hours. That kind of conduct, without more, may not lead inexorably to a conclusion of employer initiation. This case is different.

36. The petitioners made use of company resources in such a fashion as would lead a dispassionate observer or a reasonable employee to conclude that the employer directly supported the application. In the absence of any evidence to the contrary, I too, am driven to such a conclusion. The petitioners' conduct was open and notorious. The employer permitted such conduct and must equally have known that a reasonable employee would have concluded that the petitioners' efforts had the explicit support of the employer. The employer's permission in these circumstances must, more likely than not, have been grounded in its conscious and deliberate wish that employees believe that the decertification application was supported by the employer.

37. Indeed, with the exception of Hepworth's denial of any "deal" with the employer, the circumstantial evidence before me suggests that, more likely than not, there was active cooperation between the petitioners (or, even accepting Hepworth's denial, between Fraser) and the company with regard to circulating the petition and using the company boardroom for those purposes. In this regard I note once again the failure of either Fraser or the company to provide any evidence before me to negative any improper employer involvement in the application (or, to a lesser degree, to explain some of the peculiarities regarding the filing and distribution of employee lists adverted to earlier in this decision).

38. I am therefore persuaded that the employer made a contribution to the application. That contribution was two-fold. First, it permitted the petitioners' activities and thereby contributed resources (license to the petitioners to come and go during their working hours, use of the boardroom, access to employees during their working hours) which were significant to facilitating the application. But more importantly in this case, the employer, through its cooperation with and toleration of the petitioners' activities, communicated an explicit and important message to employees that it supported the application.

39. What was the effect of the employer's contribution? The chief petitioners publicly identified themselves as such in the workplace. Their posting and notice generated no response. But two weeks

later with the added resource of the mantle of employer support provided by the open use of the company boardroom and the petitioners' license to disrupt the work process, the moribund campaign received a significant boost and, in short order, sufficient signatures were solicited to warrant the filing of this application. Indeed, in view of the lack of employee interest in the termination project from the posting (on November 14th) to the petition solicitation (on November 29th), the visible hand of the employer in the solicitation process provided the much needed jumpstart which in turn significantly contributed to the project's sudden success and to the filing of this application.

40. Thus, there can be no doubt that the employer's contribution, which was made at an early or formative stage of the application, was both significant and influential. Indeed, the evidence suggests that without the employer's contribution, the petitioners would not have been in a position to solicit the requisite number of employee signatures necessary to support the termination application. In these circumstances, I am satisfied that the employer's conduct amounts to initiation within the meaning of section 63(16).

41. The Board has a discretion to dismiss a termination application where, as here, it concludes that the application was initiated by the employer. In *Bytown* (at paragraph 115) the Board observed as follows:

The purpose of subsection 63(16) is to prevent the mischief described therein. A termination application founded in the employer's initiation should result in its dismissal unless there are compelling labour relations reasons why, notwithstanding the employer's initiation of the application, a Board-supervised secret ballot should still be held. No such reasons have been suggested here.

42. I was were not provided with any reason to depart from that view. No compelling reasons to support the direction of a representation vote despite the employer's initiation of the application were advanced.

43. This application is dismissed.

1633-96-U Labourers' International Union of North America, Local 183, Applicant v. Torbridge Construction Ltd., Responding Party

Construction Industry - Damages - Discharge - Remedies - Unfair Labour Practice - Employer acknowledging violation of the Act but parties disputing appropriate remedy - Board rejecting submission that reinstatement not appropriate - Employer directed to offer grievor position if its employee complement expands to more than 20 employees in 1997 - Board making no order regarding 1998 - Board finding delay in filing complaint not unreasonable and requiring no reduction in damages to which grievor otherwise entitled - Board also finding grievor's attempts at mitigation reasonable - Board deducting workers' compensation benefits received during 5 month period from damages to which grievor otherwise entitled - Board finding that but for employer's wrongful conduct, grievor would have earned sufficient credits to entitle him to employment insurance benefits during two periods of lay-off and Board ordering damages in that respect as well

BEFORE: *G. T. Surdykowski*, Vice-Chair.

APPEARANCES: *E. M. Mitchell* for the applicant; *Joseph Liberman*, *Carmin Giardino* and *Alan Freedman* for the responding party.

DECISION OF THE BOARD; July 31, 1997**I Introduction**

1. This is a complaint under section 96 of the *Labour Relations Act, 1995* in which the applicant trade union ("Local 183") alleged that the responding employer ("Torbridge") treated Manuel Lopes in a manner contrary to sections 5, 70, 72 and 76 of the Act. More specifically, Local 183 alleged that Lopes, who had been employed by Torbridge from on or about August 10, 1992, was discharged on September 13, 1995 because he had requested a wage increase and exercised, or sought to exercise, rights under the collective agreement between the parties and under the Act, and because he had refused to continue to perform certain favours for certain managerial employees of Torbridge. Local 183 further alleged that Torbridge refused to recall or re-hire Lopes for the 1996 and 1997 construction seasons for the same improper reasons. In paragraph 14 of Schedule "A" to the complaint, Local 183 submitted that Torbridge:

- (a) sought to prevent persons from participating in the lawful activities of a trade union, contrary to section 5 of the Act;
- (b) interfered with the formation, selection and administration of a trade union and the representation of employees by a trade union, contrary to section 65 of the Act;
- (c) sought by threat of dismissal and other kinds of threats, the imposition of pecuniary and other penalties and by other means to compel employees to refrain from becoming or cease to be members of a trade union and to cease to exercise rights under the Act, contrary to section 72 of the Act;
- (d) sought by intimidation and coercion to compel employees to refrain from becoming or to cease to be members of a trade union and to refrain from exercising other rights under the Act, contrary to section 76 of the Act;
- (e) dismissed an employee without just cause, contrary to Article 6 of the collective agreement.

2. In its complaint, Local 183 requested the following relief:

- (1) A declaration that the Responding Party has violated the *Labour Relations Act*, as set out in this complaint.
- (2) An order that the Responding Party cease and desist from violating the *Labour Relations Act*.
- (3) An order that the Responding Party sign and post a notice of its violation of the *Labour Relations Act*, and deliver a copy of the Board's decision and the notice to each employee in the bargaining unit, at its own expense, during working hours.
- (4) An order that the Responding Party immediately reinstate Manuel Lopes and reimburse him for all lost wages and benefits.
- (5) Such further and other relief as may be appropriate in the circumstances.

3. This complaint was filed on September 4, 1996, at the same time as a referral to the Board of a grievance in the construction industry under section 133 of the Act (Board File No. 1626-96-G) in which Local 183's pleadings were identical as those in this complaint, although the relief requested was different in that it was limited sort of relief which is typically requested in a grievance of this nature.

4. The complaint and grievance referral were both filed as a direct result of the settlement of a section 96 complaint by Lopes against Local 183 in which he alleged that the union had violated

sections 71 and 75 of the Act, in relation to events in 1995 and 1996 involving Lopes and Torbridge (see Board decision dated June 12, 1996, unreported, in Board File No. 0577-96-U).

5. The complaint herein and the grievance referral came on for hearing together, before a differently constituted panel of the Board (the "Nairn panel") to deal with a motion by Torbridge requesting that the complaint and grievance be dismissed on the basis of delay. By decision dated February 14, 1997 (unreported), the Nairn panel granted the motion in part. The grievance was dismissed, but this complaint was allowed to proceed, and it eventually came before me beginning on June 9, 1997.

II The Issue of Liability

6. In accordance with the reverse onus provisions in section 96(5) of the Act, Torbridge proceeded first. The company called three witnesses: Carmine Giardino, sole owner and president of the company; Victor Alves, a foreman; and Moses Cordeiro, also a foreman.

7. After the company closed its case, counsel for Torbridge advised the Board that the company conceded that there had been a violation of the Act, and that on the basis of the evidence and the agreement of the parties, Torbridge was prepared to consent to a declaration that it had breached section 76 of the Act. The parties were no more specific than that.

8. In the circumstances, and having regard to the evidence and representations of counsel, I take the agreement of the parties to be that part of the submissions of Local 183 in paragraph 14(d) of Schedule "A" to its complaint has been made out; that is, that Torbridge sought by intimidation and coercion to compel Lopes to refrain from exercising rights under the Act.

9. With respect, the responding party's concession reflects a very realistic assessment of its case. Indeed, it seems to me that Torbridge's own evidence also suggested a breach of section 72(a) of the Act. However, in this decision, I will limit myself to the declaration agreed to by the parties with respect to the question of liability, particularly since there was no suggestion that limiting the declaration in that manner to a breach of section 76 would have any effect on the remedy which can be awarded by the Board in this complaint.

III Remedial Issues

10. Local 183 sought the following specific remedies (in addition to the declaration as aforesaid):

- (1) the immediate reinstatement of Lopes to employment with Torbridge, or a direction that Lopes be re-employed by Torbridge this year, and during the next (1998) construction season, in accordance with a pattern established in that respect;
- (2) damages for the lost wages or benefits Lopes would have received but for the breach of the Act by Torbridge.

11. Counsel for Local 183 identified the following issues in that respect:

- (a) whether reinstatement is appropriate;
- (b) mitigation of damages;
- (c) the effect of delay on damages;
- (d) quantum of damages.

In the course of argument, another issue emerged: the effect that should be given to the workers' compensation benefits received by Lopes between May 22 and October 23, 1996.

12. Counsel for Torbridge joined issue on the issues identified by counsel for Local 183. The company opposes reinstatement, and asserts that no damages should be awarded because of the delay in bringing the complaint and Lopes' failure to mitigate his damages. The company also asserts that the workers' compensation benefits received by Lopes should be deducted from any damages which are awarded.

13. (I note that it was common ground between the parties that the question of what effect, if any, delay should have is limited to the delay in bringing this complaint, and the effect that has regarding the responsibility for the damages suffered by Lopes as between Torbridge on one hand, and Local 183 and Lopes taken together on the other. Any issue of apportionment of responsibility for delay as between Local 183 and Lopes is not before the Board in this complaint.)

14. Lopes was the sole witness to testify with respect to the issue of remedy. It was common ground that it is appropriate for the Board to also consider the other evidence which was already before the Board to the extent that it is relevant to remedy.

(a) Reinstatement

15. Turning first to the issue of reinstatement, I have already noted that Torbridge opposes this remedy. However, the company concedes that reinstatement is one of the common remedies for breaches of the Act of the sort Torbridge has conceded it has committed in this case. Indeed, reinstatement is the usual remedy in such cases. It is the rare case in which the Board will not reinstate an employee who seeks it.

16. This is as it should be. As a general matter, an employee is entitled to be put into the position s/he would have been in but for the employer's breach of the Act. Where an employer has discharged an employee in violation of the Act, it is appropriate for the Board to reinstate the employee in employment, unless the employer satisfies the Board that there is a cogent reason not to do so. I am not satisfied that Torbridge has offered any such cogent reason in this case.

17. *Peralta Foods*, [1987] OLRB Rep. Sept. 1162 and *Saco Fisheries Limited*, [1988] OLRB Rep. Oct. 1087, both "fisheries" cases, are two of the relatively small number of cases in which the Board has declined to order reinstatement. In *Peralta Foods*, the Board was concerned that the employer had ceased operating, and in *Saco Fisheries* the Board was concerned that reinstatement would have required the employer to either put another boat to work or lay-off seven current crew members. Certainly, it is appropriate to consider whether a reinstatement order has any meaning in circumstances in which an employer has ceased operating, but, with respect, I do not think that the fact that an employee who would not otherwise have had a job in the first place may be laid off as a result of a reinstatement order is a particularly significant consideration. Nor is this a case like *Environmental Abatement Services Inc.*, (unreported OLRB decision, file no. 1815-93-OH, August 5, 1994). Lopes' employment with Torbridge was not "transitory" in the sense which concerned the Board in that case. Indeed, that is a significant point in this complaint.

18. Further, the fact that under the collective agreement Torbridge was entitled to lay-off without regard to seniority, or that it was entitled not to recall Lopes is of no more assistance to the company than it was (or would have been) as a defence on the issue of liability - which is to say that it is of no assistance at all. The grievance having been dismissed, the collective agreement is not directly in issue here, and while the rights of the parties and Lopes under the collective agreement form part of the context of the complaint, the issue is not one of rights under the collective agreement, but of rights

under the *Labour Relations Act, 1995*, which Torbridge, on its own evidence and admission, has breached.

19. One of the arguments put forward by Torbridge against reinstatement was to the effect that it virtually guarantee Lopes permanent employment with the company forever. Torbridge's fear is that if it is required to reinstate Lopes and then subsequently discharges him or does not recall him to work that it will be faced with another unfair labour practice complaint. That may be true, and if that happens, and if a *prima facie* case is made out on the pleadings, the Board will deal with the complaint as it deals with all other such complaints, including this one. Surely, an employer which has violated the Act in the manner that Torbridge has in this case cannot be heard to say that a person should be denied the usual remedy because its future conduct with respect to the employee might be viewed with suspicion. That may be true, but the employer has created the situation. Having made its bed, it must lie in it. I am not persuaded that Torbridge's fear that it may in the future be called to answer for its treatment of Lopes is a reason not to reinstate Lopes to employment.

20. In the result, I am not satisfied that there is any good reason not to reinstate Mr. Lopes.

21. However, the (agreed) fact is that Torbridge's operations will be significantly curtailed at the end of July 1997, and that the company expects to have only some eight employees working after that through to mid-September, 1997. Having regard to this, and to the pattern of Lopes' employment with Torbridge as demonstrated by the evidence, I will not require Torbridge to reinstate Lopes at this time unless it has at least 20 employees who have not yet received lay-off notices. However, if at any subsequent time in 1997, Torbridge wishes to expand its employee complement to more than 20 employees, Lopes is to be the first person to be offered the 21st position, which offer is to be made to him directly in writing, with a copy to Local 183, and which offer if made pursuant to this direction will be deemed not to be a violation of the collective agreement which has been in issue (i.e. the collective agreement between the Heavy Construction Association of Ontario and Local 183) or any other applicable collective agreement, as the case may be. I will deal with the question of employment in 1998 below.

(b) Damages

22. In the normal course, Mr. Lopes would be entitled to damages for all wages and benefits which he would have received, but for the employer's breach of the Act. This raises issues concerning how such damages are to be calculated, and whether the amount which Lopes is entitled is affected by the delay in bringing this complaint, his conduct in litigation, or the workers' compensation benefits he received in 1996.

(i) Delay

23. The jurisprudence demonstrates that the Board's approach to delay, whether when considering whether an application or complaint should be entertained at all or when considering questions of remedy, is not a mechanical one. Each situation is examined and determined according to the merits of the particular case.

24. As a general matter, however, the Board recognizes that situations are not always as clear at the time that events are unfolding as they are (or appear to be) in hindsight. In some cases, it is only with the passage of time that the basis for a complaint to the Board becomes apparent. It has long been accepted that delay is inimical to labour relations, and that the speedy resolution of labour relations disputes is both a matter of public interest and in the interest of those who are directly involved (see, for example, *Journal Publishing Co. of Ottawa Ltd. v. Ottawa Newspaper Guild, Local 205, OLRB et al*, [1977] 1 A.C.W.S. 817 (Ontario Court of Appeal); *The Corporation of the City of Mississauga*,

[1982] OLRB Rep. Mar. 420; *Re Dhanota and U.A.W. Local 1285* (1983) 42 O.R. (2d) 73, a decision of the Ontario Divisional Court dismissing an application for judicial review of the Board's decision in *Sheller-Globe of Canada Limited*, [1982] OLRB Rep. Jan. 113; *Re United Headwear and Biltmore-Stetson (Canada) Ltd. v. National Automobile, Aerospace and Agricultural Implement Workers Union of Canada, (CAW - Canada)*, (1983) 41 O.R. (2d) 287; *Dayco Canada Ltd. v. National Automobile, Aerospace and Agricultural Implement Workers Union of Canada (CAW - Canada)*, [1993] 2 S.C.R. 230 (Supreme Court of Canada). But speed is not the only objective, and justice and fairness demands that someone who may be aggrieved have a reasonable opportunity to recognize that s/he may have a complaint, to formulate a position and plan of action, to seek legal advice or representation, and to actually plead and file a complaint.

25. Accordingly, and while there is no fixed rule, in cases which involve a loss of employment or employment opportunities, the Board has developed a one year rule of thumb. When dealing with a motion to dismiss on the basis of delay, the Board will generally not dismiss a complaint which makes out a *prima facie* case where the delay is measured at less than one year, unless the responding party demonstrates actual prejudice resulting from the delay, the applicant offers no satisfactory explanation for it, and the Board is satisfied that it would be unfair or otherwise inappropriate to permit the matter to proceed. On the other hand, where the delay exceeds one year, prejudice to the responding party is presumed, and the onus shifts to the applicant to provide a satisfactory explanation.

26. The same approach is appropriate when it comes to considering the effect of delay when it comes to remedy. Delay which may not result in a complaint being dismissed without a hearing on the merits may nevertheless affect the remedy, including the amount of or responsibility for damages to which a party or person claiming through a party might otherwise be entitled. Whether or not the delay in bringing a complaint has such an effect will depend on the circumstances of the particular case (see, for example, *James N. Krall*, [1993] OLRB Rep. June 39; *Jeanne St. Pierre*, [1986] OLRB Rep. June 883; *Central Stampings Limited*, [1984] OLRB Rep. Feb. 215).

27. In this case, the complaint was filed on September 4, 1996, less than one year after Lopes was discharged by Torbridge, and only some five months after Lopes would reasonably have expected to be recalled to work in 1996 (see paragraph 65, below).

28. The only prejudice which Torbridge even implicitly asserts is that the delay has increased its exposure in terms of the amount of damages which may be awarded to Lopes. This is not a particularly compelling argument in the circumstances of this case. First, that is always an effect of delay, and does not constitute the sort of prejudice which concerns the Board; namely, the ability to fairly respond to or otherwise deal with a complaint or allegation of unlawful conduct. Second, in this case, there was no suggestion that Lopes' work was unsatisfactory. He may have had some conflict with Alves in 1994, but that did not result in any discipline or cause Torbridge not to re-hire him (albeit somewhat later) in 1995. The company could have re-hired Lopes at any time after October 23, 1996 when he was fit for work after this complaint was filed, without prejudice to its position in this case. Indeed, Torbridge could have re-hired Lopes at any time after it became aware of this complaint. In that respect, a representative of Local 183, (Leo D'Agostini) telephoned Giardino at the end of March or in early April, 1996 about it, and provided him with a copy of a letter (Exhibit #7) in which Lopes complained about the lay-off. There was a further discussion between another Local 183 representative (Roger Quinn) and Giardino in May 1996, and in mid-June 1996 the union filed the grievance. Accordingly, from as early as the end of March 1996, at approximately the time that Lopes would reasonably have expected to be recalled by the company (see below), Torbridge knew or ought to have known about Lopes' complaint about his discharge and the failure of the company to recall him in 1996. There could have been no doubt in that respect when the grievance was delivered some two and

a half months before this complaint was filed. Instead, the company persisted in its position, which it is now acknowledged was a breach of the Act.

29. In this complaint, Local 183 and Lopes must be considered as a single party for the purposes of examining the delay in bringing the complaint (see paragraph 13, above), regardless of any consideration of how responsibility for any of the delay should be apportioned as between them. In that respect, I do not think that it was at all unreasonable for the applicant to take Torbridge at its word that the “lay-off” on September 13, 1995 was *bona fide* and due to a shortage of work and to see what developed, particularly since activity in the construction industry, especially in the heavy engineering and road sectors, generally begins to decline in the Fall, and virtually stops during the Winter, and Lopes was eligible for employment insurance benefits. It was only in the spring of 1996 that it became clear that the “lay-off” was really a discharge, and that Torbridge had no intention of re-hiring Lopes, at which time Local 183/Lopes began actively pursuing the matter, which pursuit eventually lead to this complaint being filed.

30. In all the circumstances, I find that the delay in filing this complaint was not unreasonable, and should not operate to reduce the damages to which Lopes is otherwise entitled.

(ii) Mitigation

31. There is no doubt that there is a duty to mitigate damages which applies to proceedings before the Board, whether under the Act or other Legislation under which the Board has jurisdiction. What that duty consists of is another question, however. Proceedings before the Board have to do with the enforcement of important statutory rights. They are not civil proceedings, whether for wrongful dismissal or otherwise, and the Board has long recognized that the traditional common-law notion of the duty to mitigate is a poor fit in the context of unlawful discharge proceedings in which, as I have already noted, the usual remedy includes reinstatement (*P.J. Wallbank Manufacturing Company Limited*, [1980] OLRB Rep. Dec. 1797; *Beckett Elevator*, [1986] OLRB Rep. Nov. 1493). Accordingly, as the Board noted in *Jacmorr Manufacturing Limited*, [1987] OLRB Rep. Sept. 1086, caution must be exercised when common-law concepts are applied in Board proceedings. (Indeed, the Canada Labour Relations Board appears not to automatically apply any duty to mitigate to an employee who is discharged contrary to the *Canada Labour Code*. However, the Canada Board will deduct any income earned during the period between discharge and reinstatement from damages. See, for example, *Larose-Paquette Autobus Inc.*, (1992) C.L.L.C. ¶16,064; *Samuel John Snively* (1985) 12 C.L.R.B.R. (N.S.) 97; *Gerald M. Massicotte*, [1980] 1 Can. L.R.B.R. 427, affd. [1982] 1 F.C. 216 *sub nom Teamsters Union, Local 938 and Massicotte* 119 D.L.R. (3d) 193 (C.A.), affd. [1982] 1 SCR 710 (S.C.C.).) In the result, statutory and policy considerations in labour relations matters create a situation in which the duty to mitigate is more moderate than that imposed by the common-law, in wrongful dismissal actions for example. In addition, as the Board also pointed out in *Jacmorr, supra*, at paragraph 20:

There are already powerful practical pressures on a complainant to seek alternative work. After all, he must still eat, and pay the rent, and he always faces the risk that his complaint will not succeed. It is unlikely that very many workers can really afford to remain idle for very long, awaiting a “windfall” at their employer’s expense; and to the extent that he does earn income elsewhere, such sums should be deducted from any subsequent compensation award. However an employee discharged contrary to the Act is not like an employee wrongfully dismissed with no right or expectation of reinstatement. An unfair labour practice complainant need not devote his full energies to seeking permanent work elsewhere, nor must he discontinue his union activities in connection with his former workplace. He is entitled to conduct himself as if he were an employee temporarily and unlawfully put out of work, who will be returning to his job as soon as the litigation process can be completed. Of course, if he misjudges the strength of his case, he may find himself without any job or compensation at all.

32. In the result, there is a duty on persons who come before the Board seeking damages for a breach of the Act. However, the legal and policy considerations in labour relations proceedings are such that it is appropriate that this duty be somewhat less onerous than the common-law duty which applies in civil cases. Whether a person whose complaint is that s/he has been discharged or denied employment in breach of the Act has acted reasonably in that respect depends on the circumstances. Further, where a responding party (generally an employer) alleges the failure to mitigate, there is a heavy onus on it to show two things: that reasonable steps to mitigate were not taken; and that damages would have in fact been reduced if reasonable steps had been taken (*Bond Place Hotel*, [1983] OLRB Rep. Jan. 24; in a collective agreement arbitration context see *Brown and Beatty*, Canadian Labour Arbitration, (3rd), a loose leaf service, at 2:1412 and 3:2412; in a wrongful dismissal context a decision to the same effect in *Peterson v. Labatt Breweries*, (1997) 25 C.C.E.L. (2d) 241 (B.C. Supreme Court) relying on *Michaels v. Red Deer College*, (1976) 57 D.L.R. (3d) 386 (Supreme Court of Canada) and *Jorgenson v. Jack Cewe Ltd.*, (1978) 9 B.C.L.R. 292 (B.C. Court of Appeal), (appeal the Supreme Court of Canada dismissed [1980] 1 S.C.R. 812).

33. In this case, Torbridge has failed to satisfy me that Lopes did not make reasonable efforts to mitigate his damages, or that he would have been successful in that respect had he done so. The question is not whether Lopes could have done more. I think he could have, but I also think he did enough.

34. Lopes registered with Local 183's hiring hall immediately after he was discharged by Torbridge on September 13, 1995. He could have done more in pursuing employment opportunities through Local 183's hiring hall, but having regard to his reasonable albeit incorrect understanding of how the hiring hall operated, and the distance between his home in Cambridge and the hiring hall in Toronto, I cannot say he was required to do more. In addition, employment opportunities in the construction industry generally decrease in the fall so that it is difficult for construction employees to find new employment, particularly with employers with which they have no prior connection. Further, at that time it was not unreasonable for Lopes to think that he would be re-hired by Torbridge in the spring of 1996, and to do what many construction workers do (and what he had himself done previously); namely, take advantage of employment insurance benefits in the interim. When it became apparent that there was a problem with Torbridge in terms of re-employment, Lopes both stepped up his complaints to Local 183 with respect to the matter and sought and *obtained* further employment (with Joe's Masonry). Unfortunately, he was injured after working only four days, but he was clearly motivated to return to work as demonstrated by his efforts to find employment while he was disabled and receiving Workers' Compensation benefits, by his attempts to persuade his doctor that he was able to return to work, and by the fact that he returned the last cheque he received from the Workers' Compensation Board. On the evidence, Lopes is not a malingerer.

35. Lopes was not declared fit for work again until October 23, 1996, late in the construction season. Giardino's testimony to the effect that there was a lot of construction work available in 1996 was not specifically identified with the period after October 23rd, 1996, and Torbridge's records indicate that its own operations wound up earlier than they had in the previous years.

36. In 1997, Lopes continued to look for work, and finally found it at Arjune Engineering & Manufacturing Limited.

37. In assessing the evidence and situation as a whole, I cannot ignore the fact that Local 183 appears to have been less than responsive to Lopes' concerns or complaints concerning either the termination of his employment by Torbridge on September 13, 1995, or the failure of Torbridge to recall him to work in 1996. This is apparent both on the evidence, and in the settlement, (which was not made without prejudice or without admission of liability) of Lopes' complaint against Local 183 which led to this complaint. Consequently, I consider it likely that Local 183's records are less than an

accurate reflection of Mr. Lopes contacts with its hiring hall after September 13, 1995 and in 1996, although I also think it unlikely that Lopes either telephoned or went to the hiring hall as often as he testified he recalled doing. In that respect, I do not suggest that I believe that Lopes was trying to mislead the Board, only that his recollection is not as good as he thinks. In addition, the parties agreed that internal chaos in Local 183 in February and March 1996 resulted in incomplete hiring hall records during that period.

38. Nevertheless, I am satisfied that Lopes did contact the hiring hall more than the three times the hiring hall records suggest. I am satisfied that he did so immediately upon being laid off by Torbridge on September 13, 1995, and several times after that in 1995. I am also satisfied that he had some, albeit infrequent, contact with the hiring hall prior to May, 1996. He could have been more persistent in that respect, but I am satisfied that there were two major reasons why he wasn't: first, he still hoped and expected to be recalled by Torbridge; and, second, he misunderstood how the hiring hall out-of-work list is operated by Local 183. (In that latter respect, his understanding was that it operated in the way that many other construction trade unions' hiring halls operate and was not unreasonable, although he could also have made inquiries in that respect.)

39. Lopes was not recalled by Torbridge in 1996 and did not find other employment until May, 1996. In the result, he was unemployed, receiving employment insurance benefits from September 14, 1995 to May 13, 1996.

40. On May 14, 1996, Lopes began work as a bricklayer with a company called "Joe's Masonry". Unfortunately, he worked only four days (May 14, 15, 17 and 21, 1996) before he was injured at work. (I note that Mr. Lopes testified that he has not been paid for those four days, but that is a matter between him and Joe's Masonry.)

41. The injury Lopes' suffered was a compensable one, and he received workers' compensation benefits totalling \$8,396.01 between May 22 and October 23, 1996. He received a subsequent cheque from the workers' compensation board in the amount of \$758.85, which he returned because he had been declared fit to work. Lopes continued to be unemployed until April 30, 1997, when he obtained work at Arjune Engineering & Manufacturing Inc. in Waterloo at \$7.50 per hour, and where he is currently employed.

42. Lopes testified that he looked for work in many places, but he was able to specifically identify only seven, one of which was a temporary placement agency.

43. In the circumstances, I am satisfied that Lopes' attempts at mitigation were reasonable. Further, Torbridge offers nothing more than speculation when it suggests that Lopes would have been able to mitigate his damages more than he in fact did if he had done something more in that respect.

(iii) The Workers' Compensation Benefits Issue

44. I turn now to the question of whether the workers' compensation benefits received by Lopes between May 22, 1996 and October 23, 1996 should be deducted from the damages to which he is entitled. The parties referred me to no arbitral or Labour Board decisions on this point, and I am unaware of any. Counsel did refer me to civil cases in which the issue has been addressed. As I have already indicated, it is appropriate for the Board to be cautious in applying common law doctrines or approaches to matters in its jurisdiction. However, the fact that common-law rules or doctrines do not always fit well in labour relations matters does not mean that the way in which the Courts approach an issue cannot provide some useful guidance, particularly when it comes to matters of principle.

45. As might be expected, and as is the case with the issue of mitigation, the issue of what is properly deducted from an award of damages when a contract of employment is in issue has arisen in wrongful dismissal cases.

46. It has long been settled that earnings from employment during the “damages period” are appropriately deducted from damages. The Courts have also considered whether sickness, accident or disability benefits (which I will consider under the single category of disability benefits) under a policy paid for by the employer, unemployment insurance benefits and workers’ compensation benefits should be deducted from damages.

47. Beginning with the principle that the purpose of damages in a wrongful dismissal action is to restore a plaintiff to the position s/he would have been in if the contract of employment had been properly performed, the courts in Ontario and British Columbia began to develop a theory that it is not appropriate to deduct the value of “collateral benefits” from damages. The doctrine of collateral benefits was initially developed in tort cases where it was determined that justice, reasonableness and public policy required that a tortfeasor not be able to deduct from damages benefits paid to an injured person under an insurance or pension scheme devised by that person or his employer (see, for example, *Boarelli v. Flannigan*, [1873] 3 O.R. 69 (Ontario Court of Appeal), particularly at page 72 per Dubin J.A.). It appears that this doctrine was extended to contracts cases in *Jack Cewe Ltd. v. Jorgenson*, [1980] 1 S.C.R. 812 (Supreme Court of Canada) where it was determined that unemployment insurance benefits are not to be deducted from damages for wrongful dismissal. This theory was also applied to disability benefits by the British Columbia Court of Appeal in *Chan v. Butcher et al.* (1984) 11 D.L.R. (4th) 233, despite the fact that the New Brunswick Court of Appeal had taken the opposite view in *Bursey v. Acadia Motors Ltd.*, (1980) 35 N.B.R. (2nd) 587. Turning specifically to the question of workers’ compensation benefits, in *Salmi v. Greyfriar Developments Ltd.*, (1985) 17 D.L.R. (4th) 186, the Alberta Court of Appeal held that workers’ compensation benefits are payments in lieu of earnings and as such are equivalent to earnings in mitigation of loss, and should therefore be deducted from damages.

48. In *McKay v. Camco, Inc.*, (1986) 53 O.R. (2d) 257, the Ontario Court of Appeal reversed the trial judge’s decision to deduct disability benefits from an award of damages for wrongful dismissal. In doing so, the Court of Appeal appears to have equated disability benefits with workers’ compensation benefits, and specifically disagreed with the decisions of the New Brunswick Court of Appeal and Alberta Court of Appeal in *Bursey*, *supra*, and *Salmi*, *supra*, respectively as follows:

Having reached this conclusion, I must respectfully disagree with the decision of the New Brunswick Court of Appeal in *Bursey v. Acadia Motors Ltd.* (1980), 35 N.B.R. (2d) 587, which held that sick benefits payable to a dismissed employee under a sickness and accident insurance policy paid for by the employer could be deducted from damages for wrongful dismissal. For the same reason, I cannot agree with the decision of the Alberta Court of Appeal in *Salmi v. Greyfriar Developments Ltd.* (1985), 17 D.L.R. (4th) 186, [1985] 4 W.W.R. 463, Alta. L.R. (2d) 182, which also proceeds on the theory that disability payments made by an employer are deductible from damages for wrongful dismissal. In the passage from the court’s judgment quoted by my brother Finlayson, it is stated that the disability payments made in that case to the employee by the Provincial Workers’ Compensation Board could be characterized as payments by the employer because only employers contributed premiums to the board. It also is assumed that workers’ compensation had been established solely for the benefit of employees.

It is not necessary in this case to decide whether this view of workers’ compensation expresses the law of Ontario but I have serious doubt that it does. Workers’ compensation schemes are established by provincial law and are underwritten by the resources of provincial governments. They confer benefits upon both employers and employees as Madam Justice McFadyen observed in her judgment at trial ([1983] 6 W.W.R. 409, 27 Alta. L.R. (2d) 204, 1 C.C.E.L. 82) when she pointed out at p. 412: “The legislation establishing the plan precludes a damage action against the employer arising out of a work related injury.” In my opinion, payments from workers’ compensation boards

might be compared with unemployment insurance payments which, as mentioned above, are not deductible from damages awarded for wrongful dismissal: *Jack Cewe Ltd. v. Jorgenson*, *supra*, and *Peck v. Levesque Plywood Ltd.* (1979), 27 O.R. (2d) 108, 105 D.L.R. (3d) 520, 7 B.L.R. 250 (C.A.).

49. The Court of Appeal distinguished between the right to reasonable notice and the right to (in that case) disability benefits from the employer's disability insurance plan, holding that these were two separate and independent legal rights, which could not be set off against each other.

50. Following this lead, the Court in *Warren v. Orlick Industries Ltd.*, (1993) 47 C.C.E.L. 198 (Ontario General Division) declined to deduct workers' compensation benefits from damages, holding that such benefits are paid as a result of injuries unrelated to dismissal from employment.

51. *McKay*, *supra*, has also been followed by the British Columbia Court of Appeal in, for example, *Sylvester v. British Columbia*, (1995) 125 D.L.R. (4th) 541; *Datardina v. Royal Trust Corp.*, (1995) 12 C.C.E.L. (2d) 86 and *Bohun v. Similco Mine Ltd.*, (1995) 12 C.C.E.L. (2d) 92.

52. That, however, is not the law now that the Supreme Court of Canada has spoken. In an unanimous decision issued on May 29, 1997 ([1987] S.C.J. No. 58) in *Sylvester*, *supra*, the Supreme Court of Canada overturned the British Columbia Court of Appeal. The Supreme Court held that the fact that an employee was unable to work during the notice period is irrelevant to an assessment of damages, but that the disability benefits in that case were intended to be a substitute for income, that an employee was not entitled to receive salary and disability benefits at the same time, and that it was therefore appropriate to deduct disability benefits received from the award of damages for wrongful dismissal. The Supreme Court pointed out that in the absence of an indication that the parties indicated otherwise, an employee who is dismissed when s/he is not working but receiving disability benefits and an employee who is working when s/he is dismissed should receive equal treatment; and that deducting disability benefits would have the effect of ensuring that employees receive equal damages consisting of income they would have received had the employee worked during the notice period. The Supreme Court of Canada has therefore rejected the "two independent rights" theory put forward in *McKay*, *supra*.

53. The Supreme Court of Canada in *Sylvester*, *supra*, was careful to distinguish that case from the decisions involving unemployment insurance or workers' compensation benefits, on the basis that those benefits are statutory while disability benefits are contractual.

54. With respect, I agree with the Supreme Court of Canada's reasoning in *Sylvester*, *supra*, regarding the deduction of disability payments from damages for lost income, whether during an appropriate period of notice or otherwise. However, I respectfully see no reason to distinguish between benefits on the basis of whether they are paid pursuant to a statutory scheme or a private insurance plan. Instead, I find the Supreme Court's analysis equally applicable to the question of workers' compensation benefits.

55. The purpose of unemployment insurance benefits is to provide (limited) income replacement protection for persons who become unemployed through their fault of their own. Benefits are paid out of the Federal Government's consolidated revenue fund, into which both employers and employees pay premiums to help finance the scheme. Disability benefits of any sort which are tied to a person's inability to work are intended to replace, sometimes only partially) the income which the person would have earned if s/he had been able to work during the disability period.

56. The workers' compensation system in Ontario in really a form of statutory income replacement insurance for employees who suffer work related partial or total temporary or permanent disabilities. With respect, the *McKay*, *supra*, decision (see paragraph 48 above) betrays a fundamental

misunderstanding of the workers' compensation system in Ontario, and incorrectly concludes that workers' compensation benefits and unemployment insurance benefits should be treated the same way when it comes to an assessment of damages. First, although Ontario's workers' compensation system is established by provincial legislation, it is not underwritten by the resources of the provincial or any other government. The benefits paid to injured workers under the *Workers' Compensation Act* are entirely funded by employers. Indeed, the entire workers' compensation structure is financed by contributions from employers. No funds are provided by the provincial government.

57. The workers compensation scheme in Ontario, which is mandatory for the majority of workers in Ontario, whether they are unionized or not, is intended to benefit both employers and employees by providing a no-fault income replacement insurance plan which largely (but not completely) replaces and takes away the right of employees who suffer work related injuries or disabilities to sue in tort.

58. All three of these, unemployment insurance benefits, private disability benefits and workers' compensation benefits exist together. All provide income replacement benefits. Although there are some "special" benefits available under the *Employment Insurance Act*, (see sections 21 and 22 for example), the employment insurance scheme (still referred to by most people as the U.I. or unemployment insurance scheme) is primarily intended to partially and temporarily provide income to people who have temporarily or permanently lost their jobs through no fault of their own, who are able to work. Accordingly, persons who are unable to work as a result of a disability, whether work-related or not, are not entitled to employment insurance benefits (unless they can bring themselves within the "special" provisions). Accordingly, a person who is receiving temporary total disability benefits, (as opposed to a disability pension) from the Workers' Compensation Board is disentitled from employment insurance benefits. Further, temporary partial workers' compensation benefits (but not a permanent partial disability pension) is considered to be income for *Employment Insurance Act* purposes.

59. *Non-Workers' Compensation Act* private disability insurance plans are intended to provide income replacement protection to persons who become disabled and unable to work for reasons which are not work related within the meaning of the *Workers' Compensation Act*.

60. It does not matter what the scheme is, or who funds it. So long as the purpose of benefits paid under the scheme is to provide income replacement, and is taxable as income (as both employment insurance and workers' compensation benefits are), it is appropriately treated in the same way as income actually earned in mitigation during the damages period for damages assessment purposes.

61. This does not mean that employment insurance benefits and workers' compensation benefits should be treated the same way. On the contrary, it is quite appropriate that employment insurance benefits not be deducted from damages assessed by a Court or this Board, while workers' compensation benefits are properly deducted. This is because the *Employment Insurance Act* contains the following provisions:

45. Return of benefits by claimant. - If a claimant receives benefits for a period and, under a labour arbitration award or court judgment, or for any other reason, an employer, a trustee in bankruptcy or any other person subsequently becomes liable to pay earnings, including damages for wrongful dismissal or proceeds realized from the property of a bankrupt, to the claimant for the same period and pays the earnings, the claimant shall pay to the Receiver General as repayment of an overpayment of benefits an amount equal to the benefits that would not have been paid if the earnings had been paid or payable at the time the benefits were paid.

46.(1) Return of benefits by employer or other person. - If under a labour arbitration award or court judgment, or for any other reason, an employer, a trustee in bankruptcy or any other person becomes liable to pay earnings, including damages for wrongful dismissal or proceeds realized from the property of a bankrupt, to a claimant for a period and has reason to believe that benefits

have been paid to the claimant for that period, the employer or other person shall ascertain whether an amount would be repayable under section 45 if the earnings were paid to the claimant and if so shall deduct the amount from the earnings payable to the claimant and remit it to the Receiver General as repayment of an overpayment of benefits.

(2) Return of benefits by employer. - If a claimant receives benefits for a period and under a labour arbitration award or court judgement, or for any other reason, the liability of an employer to pay the claimant earnings, including damages for wrongful dismissal, for the same period is or was reduced by the amount of the benefits or by a portion of them, the employer shall remit the amount or portion to the Receiver General as repayment of an overpayment of benefits.

The *Workers' Compensation Act* contains no analogous provisions.

62. The result is that one way or the other the employment insurance benefits received during the damages period must be "recovered". It is not appropriate for these benefits to be deducted at the assessment stage because they must be "returned" subsequently. Indeed, deducting them at the damages assessment stage would not negate the statutory requirement that the benefits paid during the damages period be returned, and the "injured" person would end up returning the employment insurance benefits payments twice, and would therefore not be placed in the position s/he would have been in but for the employer's wrongful conduct, whether in breach of contract or otherwise. On the other hand, the only place where workers' compensation benefits can be taken into account or "recovered" is at the damages assessment stage. If such benefits were not deducted from damages, a wrongfully dismissed person who received workers' compensation benefits during the notice period would end up being better off than a wrongfully dismissed person who received no such benefits during the same notice period. It is only by deducting workers' compensation benefits from payments that the "injured" person is in fact placed in the position s/he would have been in but for the breach of contract or of the *Labour Relations Act, 1995*, as the case may be.

63. The question then becomes whether this approach is appropriate in proceedings before the Board. A civil action for wrongful dismissal is not the same as an unfair labour practice complaint to the Board in which an unlawful discharge is alleged. A wrongful dismissal action is based on a person's individual contract of employment, and therefore is rooted in individual rights under a private contract between the employment parties. An unfair labour practice complaint is based on public statutory rights. As a result, the proceedings are different, onuses of proof tend to be different, policy considerations are not the same, and the remedies which are available are different. In that latter respect, for example, the courts will not order specific performance of an individual contract of employment (that is, they will not reinstate an employee to employment), while reinstatement is part of the usual remedy in unfair labour practice complaints which involve a discharge. However, there are also similarities. For purposes of this case, the most significant similarity is that both the Courts and the Board will award damages. The Courts award damages on the basis that the employer breached the individual contract of employment, not by discharging the person (which the employer is entitled to do, whether or not it had just or any cause, and even if none of its reasons were proper) but by failing to give reasonable notice or to pay severance in lieu thereof, and the Board will do so on the basis that the discharge itself was unlawful. The most significant head of damages in a wrongful dismissal action is usually the income the plaintiff would have earned during the notice period. Similarly, the most significant head of damages generally awarded by the Board in addition to reinstatement in an unlawful discharge case is the income which the employee would have earned but for the employer's unlawful conduct. The theories underlying the assessment of damages are somewhat different, but in both cases these damages are for lost income. That is why the doctrine of mitigation applies in both cases. It is also why, it is appropriate to deduct income replacement benefits which are received during the damages period from damages. This includes workers' compensation benefits.

64. Accordingly, I am satisfied that the workers' compensation benefits received by Lopes between May 22 and October 23, 1996 should be deducted from the damages to which he is otherwise entitled.

(iv) Assessment of Damages

65. In assessing the damages suffered by Lopes as a result of Torbridge's breach of the Act in this case, I must determine when he would have worked but for that wrongful conduct and the effect which this had. Having regard to the evidence before the Board in that respect, and particularly Torbridge's own records, I am satisfied, on a balance of probabilities, that but for Torbridge's unlawful conduct:

- (a) in 1995 Lopes would not have been laid off until December 8th;
- (b) in 1996 Lopes would have been hired and started work on March 25th and would not have been laid off until November 15th;
- (c) in 1997 Lopes would have been hired and would have started work on March 25th and would have been laid off when the number of construction employees employed by Torbridge fell below 20.

66. Lopes is therefore entitled to damages for lost income and benefits which he would otherwise have earned between September 13th and December 8, 1995, March 25th and November 15, 1996, and March 25, 1997 until the date he is either re-employed or Torbridge had less than 20 construction employees. All income which he earned (whether or not he has received it) during the damages period is to be deducted from these damages, including the amounts he earned during the four days he worked for Joe's Masonry, the income he has earned from his employment with Arjune Engineering & Manufacturing Inc., and the workers' compensation benefits he received between May 22 and October 23, 1996. (For purposes of clarity in that latter respect, Lopes is entitled to damages for the difference between what he would have earned with Torbridge and what he received from the workers' compensation board.) I note that Lopes testified that he has not been paid for the work he performed for Joe's Masonry. That is a matter between him and Joe's Masonry, and the amount he earned is nevertheless properly deducted from his damages in this complaint.

67. In addition, but for Torbridge's wrongful conduct, Lopes would have earned sufficient credits to entitle him to employment insurance benefits between December 9, 1995 and March 24, 1996, and between November 16, 1996 and March 24, 1997. He is entitled to damages in that respect as well.

(v) Declarations and Orders

68. In the result, the Board:

- (1) declares that Torbridge Construction Ltd. has violated section 76 of the *Labour Relations Act, 1995*;
- (2) orders Torbridge Construction Ltd. to cease and desist from treating Manuel Lopes in a manner contrary to the *Labour Relations Act, 1995*;
- (3) orders Torbridge Construction Ltd. to forthwith reinstate Manuel Lopes to employment unless it presently has fewer than 20 construction employees, in which case the company is not required to reinstatement but must conduct itself in accordance with paragraph 21 of this decision;

- (4) orders Torbridge Construction Ltd. to pay to Manuel Lopes, as damages for its unlawful conduct as aforesaid, consisting of:
- (a) the wages and benefits which he would have received between September 13 and December 8, 1995, and March 25 and November 15, 1996, and March 25, 1997 until the date he is either re-employed by the company or the company had less than 20 construction employees;
 - (b) the unemployment insurance benefits Manuel Lopes would have received between December 9, 1995 and March 24, 1996, and between November 16, 1996 and March 24, 1997;
 - (c) less his income from Joe's Masonry, the workers' compensation benefits he received, and his earnings from Arjune Engineering & Manufacturing Inc.

69. In my view, this is not a case which merits a posting or similar such ancillary relief. Local 183 is free to distribute or to publicize this decision as it considers appropriate.

70. I do not consider it appropriate to order Torbridge to employ Lopes in 1998. In my view, such prospective relief is not appropriate. It may be that the company will re-employ Lopes in 1998. If it does not, its decision not to do so may not be in breach of the Act. If it does breach the Act in that respect, the appropriate proceedings can be brought against the company.

71. Finally, I shall remain seized with this matter for the purpose of dealing with any issues or questions concerning the calculation or quantum of damages, or anything else having to do with the implementation of this decision.

0691-97-U; 0692-97-U National Automobile, Aerospace, Transportation and General Workers Union of Canada (CAW-Canada) and its Local 1008, Applicant v. **Vulcan Containers Ltd.** and Vulcan Containers (Ontario) Ltd., Vulcan Packaging Inc., Responding Parties

Lock-Out - Related Employer - Remedies - Sale of a Business - Board not accepting submission that assignment in bankruptcy or that bankruptcy court orders should cause Board not to find sale of a business - Sale of a business and single employer declarations issuing - Board finding that successor employer's refusal to re-open plant closed by predecessor so long as employees there do not agree to concessions amounting to technical unlawful lock-out - Board declining to make cease and desist order in order to permit continuation of bargaining between the parties

BEFORE: *Robert Herman*, Alternate Chair.

APPEARANCES: *Judith McCormack* and *Dick Charleton* for the applicant; *Michael Horan*, *Jamie Knight*, *Kristin Taylor*, *Alex Telfer*, *D'Arcy Bird* and *Howard Kaplan* for the responding parties.

DECISION OF THE BOARD; August 21, 1997

1. This is an application under section 96 of the *Labour Relations Act, 1995*, alleging that the responding employers breached sections 17, 70, 72, 76, 79, 82 and 83 of the Act, and a related application under section 101 of the Act, alleging that the responding employers have engaged in an unlawful lock-out. The applicant also pleads there has been a "sale of a business", as contemplated by

section 69 of the Act, from Vulcan Packaging Inc. (also referred to as “Packaging”) to Vulcan Containers Ltd. (“Containers”) and Vulcan Containers (Ontario) Ltd. (“Ontario”), and as well, that all three responding parties are a single employer, within the meaning of section 1(4) of the Act.

2. This matter was scheduled and heard in an expedited fashion, as the plant in question remains closed and the entire bargaining unit remains out of work. For this reason, the Board issued a short decision on June 23, 1997, approximately 10 days after the hearing concluded, as follows:

1. For reasons that will issue later, the Board concludes that there has been a “sale” of a business, within the meaning of section 69 of the *Labour Relations Act, 1995*, from Vulcan Packaging Inc. to the two other responding parties, Vulcan Containers Ltd. and Vulcan Containers (Ontario) Ltd.

2. The Board also finds that the three companies are a single employer for purposes of the Act, pursuant to section 1(4) of the Act.

3. The collective agreement between the applicant and Vulcan Packaging Inc. is therefore binding upon the two other responding parties.

4. With respect to the unfair labour practice complaints, the Board finds no breach of the Act by any of the responding parties in the entering into of the “Side Agreement” or in the filling out and/or forwarding of the Records of Employment for employees of Vulcan Packaging Inc., nor a breach of section 17 of the Act in the failure of Vulcan Packaging Inc. in bargaining to disclose certain information.

5. Finally, while there may technically be an unlawful lockout ongoing, in the circumstances the Board does not consider it inappropriate that the responding parties be able to continue to engage in the discussions with the CAW which they had engaged in prior to the sale, over whether concessions will be forthcoming, or whether the Petrolia facility will remain closed. Accordingly, no cease and desist relief will issue in respect of the unlawful lockout.

3. We now provide our reasons.

The Facts

4. Packaging is a company that supplied custom decorated sheet metal to other fabricators of metal products. At the time that these events occurred, Packaging employed approximately 283 employees, at three manufacturing facilities in Ontario and one manufacturing and one warehouse facility in Quebec. One of these manufacturing facilities is a Drum Manufacturing Plant in Petrolia, Ontario, which employs about 60 to 65 employees. The employees of Packaging at this location are represented by the applicant, CAW Local 1008 (also referred to as “Local 1008” or “CAW”). There are also salaried non-union employees and managerial employees working at Petrolia.

5. Of the other four facilities or sites, none of which is in Petrolia, the United Steelworkers (“USW”) is the bargaining agent for two bargaining units, the Graphic Communications International Union (“GCIU”) for one bargaining unit, and the Communications, Energy and Paperworkers Union (“CEP”) for one.

6. The company had been in serious financial difficulty for some period of time, beginning as early as 1987. Nevertheless, it was able to continue in business, largely through financing from the National Bank (the “Bank”). In 1993 and 1994, Packaging was forced to sell some of its divisions, in order to reduce Bank indebtedness. One such division was its Vulsay Division, sold to D’Arcy Bird (the dominant force and the individual with the largest financial interest in the group that eventually bought Packaging referred to generally as the “Purchasing Group”). Bird became Vulsay’s Chairman and Chief Executive Officer.

7. Even after selling these assets, the company was unable to keep its credit with the Bank in good standing. Reflective of this, in October, 1994, the Bank gave notice to Packaging that it was in default on its banking covenants.

8. Also in 1994, Alex Telfer, the President and Chief Operating Officer of Packaging since 1984, bought all the outstanding shares and debt of Packaging, thus becoming its sole shareholder and director, along with continuing to act as President and Chief Operating Officer. Telfer would later join Bird as a key member of the group that eventually bought Packaging.

9. In the fall of 1995, Bird approached Telfer to see if he was interested in becoming a part of the Purchasing Group, a group of investors being put together to buy Packaging, but Telfer did not at that time join the Purchasing Group. By May, 1996, the group was in serious negotiations with the Bank and Packaging about a potential sale of the company to the Purchasing Group. In June, 1996, Bird signed a Letter of Intent with the Bank to purchase the assets of Packaging. There followed a long period of negotiations between these three parties, the Bank, the Purchasing Group, and Packaging. During this period, Packaging continued to lose substantial amounts of money, and its debt continued to mount.

10. Around October 1, 1996, the Bank notified Packaging that it was in default of its obligations, and the Bank demanded payment of approximately 43 million dollars, the amount that it appears was by then owing to it by Packaging. This demand was made while the Bank was still negotiating with Bird and the Purchasing Group over the sale of Packaging to the Purchasing Group. The Bank was quite desirous of closing this deal, as the Purchasing Group wanted to operate all the Packaging facilities as “going concerns”, and the Bank’s chances of recovering a greater percentage of the money owed to it were significantly enhanced if Packaging was able to continue to operate as a business. The only other alternative was to liquidate all or some of its assets, and in such circumstances, the Bank was likely to recover substantially less of the money it was owed.

11. While these negotiations over a potential sale to Bird’s Purchasing Group continued, Packaging was negotiating with the CAW a renewal of its collective agreement covering the Petrolia facility. These negotiations took place in the fall of 1996. During negotiations, Packaging was not asked about and did not disclose the details of its then shaky financial status, nor the existence of the Purchasing Group and the negotiations between it and the Bank. The company did tell the CAW that it was in financial difficulty and could not afford raises. Unfortunately, no more details of the negotiations were placed before the Board, and beyond this limited glimpse, the evidence provides little further information about what took place. A collective agreement was successfully negotiated, signed, and ratified, around the end of October, 1996.

12. By late March, 1997, the Purchasing Group and the Bank had agreed on terms and conditions of a sale of Packaging to the Purchasing Group, and the goal was to close the deal by April 4, 1997.

13. The Purchasing Group had set up a number of corporate entities including the two responding parties, Containers and Ontario, to buy different components of Packaging. When the purchase eventually occurred, only Containers and Ontario obtained any interest in Petrolia, and the other companies are not in issue in the instant proceedings.

14. There had been a number of alternatives for structuring the sale transaction, but ultimately the practical insolvency of Packaging effectively dictated the route chosen by the Bank and the Purchasing Group. It was agreed that Packaging would go through the assignment in bankruptcy and immediately thereafter seek court approval for a sale to the Purchasing Group. This would have the effect of enabling the Purchasing Group to shed most of the debt load of Packaging. Both the Bank, the motivating force in the restructuring and sale, and the Purchasing Group were desirous of the business

continuing without hiatus, and without the bankruptcy and immediate sale, they were of the opinion that the business (at any of its facilities or locations) could not continue to operate.

15. One key point remained for the Purchasing Group, securing an agreement with Packaging's steel supplier, Dofasco, so that Dofasco would continue to supply Packaging with steel, or more accurately, would begin to supply the new owners of Packaging with steel. Securing other suppliers of steel was not feasible, both because of the three month lead time necessary for any other supplier to be able to manufacture the product to the specifications of Packaging, and because the market at this time was characterized by a scarcity of steel. Steel manufacturers like Dofasco had more customers than they could satisfy, and were generally allocating to existing customers less steel than they had ordered. They were also not readily taking on new customers.

16. A meeting with Dofasco officials was set up for April 3, 1997 to disclose these plans and to secure Dofasco's commitment to supply steel. Had Dofasco agreed to supply the steel, the bankruptcy and the sale of Packaging would have been effected. But Dofasco refused. It told the Purchasing Group that it would only supply steel if there was a commitment from the new company (the new corporate entities that purchased Packaging are sometimes, for convenience sake, referred to in the singular) that Dofasco would be paid the approximately 1.2 million dollars it was still owed by Packaging. This response presented a serious problem for the Purchasing Group. In order to go through with the sale, it needed Dofasco's support and commitment, but it now knew it could not get that commitment without an undertaking in return, backed up by solid financial guarantees, that the predecessor's debt to Dofasco would be paid by the Purchasing Group.

17. The Purchasing Group did not have the ability to come up with the additional 1.2 million dollars, and more than that, it felt that these extra monies rendered its potential purchase uneconomical and unsound. With such a debt load burdening the new company, Bird concluded that the new company would not be able to make an operating profit. Without Dofasco's steel product, on the other hand, the new company would be unable to operate at all.

18. The proposed deal was in danger of fast unravelling. At the Bank's insistence, the day after the meeting with Dofasco, Packaging filed a notice of intention to make a proposal, and Ernst & Young Inc. ("EYI") was appointed as Interim Receiver, thus imposing a stay of proceedings against the company for a period of thirty days. As Interim Receiver, EYI monitored receipts and disbursements of the company, but the day-to-day operation of Packaging remained in the control of Telfer and Packaging's other managers and officials. EYI subsequently made an arrangement with Dofasco for the short term continuing supply of steel, under terms whereby EYI guaranteed payment in a manner satisfactory to Dofasco. These steps bought some measure of additional time to find a way to make the deal still work.

19. At this point, Bird and the rest of his Purchasing Group were not confident that the deal would close. Bird was only interested in buying Packaging as an on-going business, but was not prepared to buy without a guarantee of steel supply. Yet he could not afford to pay an additional 1.2 million dollars, the payment required by Dofasco before it would supply more steel. Bird needed to quickly find another source of funds or the deal would not close, and the Bank would impose a bankruptcy on Packaging, with its five facilities, and would liquidate the assets of the company. Bird concluded that a source of funds could be found through wage concessions from the unions that represented the employees of Packaging. Without these concessions, he felt all the employees, unionized and non-unionized, would be out of work, since without them the company would have to close and liquidate its assets.

20. Around April 9, 1997, Bird directed the General Manager (of some of the divisions of Packaging) to contact all four of the unions to explain what was happening, and to arrange for a meeting

with Bird and other members of the Purchasing Group. A letter was sent to the four unions, CAW, USW, GCIU and CEP, the next day outlining the concessions being sought by the Purchasing Group, and indicating that the concessions were to apply to all employees: salaried, hourly (i.e. unionized), and management. Bird, Telfer (by now a member of the Purchasing Group), and a third member of the Purchasing Group, John Rea, met on April 14, 1997 with the unions. Financial data was supplied to the unions (after each had signed confidentiality agreements), including the details of Dofasco's demands. Attending for the CAW were the CAW staff representative for Local 1008, Dick Charleton, and CAW counsel. The unions all rejected the concessions then being sought by the Purchasing Group. They agreed to meet again soon for further discussions.

21. A second meeting was scheduled with the unions for April 17, 1997. Again, Bird, Telfer and Rea attended on behalf of the Purchasing Group. The four unions met by themselves prior to the meeting with the Purchasing Group. At this union meeting, the CAW advised the other unions that it was not willing to participate with them in the discussions, but would be speaking directly, and on its own, with the Purchasing Group.

22. That is what happened that day. The CAW met first with the Purchasing Group, while the other unions waited. Full financial data was again made available to the CAW. The CAW told the Purchasing Group it would neither participate with the other unions nor enter into any wage concessions with the Purchasing Group.

23. The Purchasing Group then met with the other three unions. This meeting continued well into the evening. By the end of it, all three unions had reviewed the financial data and were apparently satisfied with the need for concessions to enable the Purchasing Group to buy Packaging, which in turn meant that the company could continue to be operated as an on-going business. Concession agreements were signed by the three unions and by "Vulcan Containers Ltd. (New Purchasing Group)". The three agreements were identical in substance, and were all subject to ratification. In the agreements were clauses requiring the concessions to apply to all employees of the Purchasing Group, and clauses whereby the Purchasing Group agreed to continue to operate all of the company's facilities. This latter clause encompassed Petrolia, where the CAW, which had made no agreement, was the bargaining agent.

24. The bargaining units of the three unions subsequently ratified these agreements.

25. The Bank was still pressuring Bird to complete the deal. After obtaining the concessions from the three unions, Bird approached the Bank and suggested that the Purchasing Group buy the company and its assets except for its Petrolia facility. The Bank refused to allow Petrolia to be carved out of the sale arrangement.

26. On April 24, 1997, Local 1008 conducted a vote of its membership. The CAW made known its opposition to the granting of concessions. The membership rejected the proposals for concessions. The next day, the Purchasing Group provided the employees of Petrolia with copies of the concession agreement signed by the other unions, as well as by non-union and management personnel. Another vote was held of the members in the bargaining unit on April 30, 1997. The proposals for concessions were again rejected by a large majority of the membership.

27. In a letter sent April 30, 1997 to Charleton, Bird again made clear to the CAW his position. He wrote that the Purchasing Group was going to proceed to purchase all of the divisions and facilities of Packaging. He noted that all employees at the other facilities had agreed to be employees in the "new" company, by accepting the concessions. Accordingly, those facilities were to continue to operate. Since the CAW would not accept the same concessions, Bird advised that the Purchasing Group was unable to operate Petrolia. The Purchasing Group would therefore either liquidate or relocate the

Petrolia assets unless the bargaining unit members of the CAW agreed to the same concessions as agreed to by the other employees. At this point, of course, the Purchasing Group was not the employer, nor was it bound to any collective agreement with the CAW.

28. In this letter, Bird also commented on statements he noted had been made by the CAW at the April 17th meeting with the other unions, where it stated that unemployment insurance “may be a better option than accepting a wage concession”. Bird stated his view of the inadequacy of unemployment insurance, and indicated that the Petrolia employees, having rejected the concessions, might be disqualified or delayed in their receipt of unemployment insurance benefits.

29. In a response the next day, Charleton advised Bird of the two votes the membership had taken, and of the rejection of the proposals by large majorities each time. The CAW also advised that it was willing to continue to meet with the company and to discuss alternative proposals that might provide cost reductions and savings to the new company. It listed some suggestions to this end. It is not apparent that the CAW suggestions would have saved meaningful amounts of money, but in any event, the concession agreements signed with the other unions required that the CAW grant the same concessions. The CAW proposals for savings did not include any wage or benefits concessions by its members, except an offer to work one Saturday overtime shift per month, for three months, at straight time wages.

30. The 30 day period during which EYI had been appointed Interim Receiver was due to expire shortly, which would end the stay of proceedings against Packaging by creditors. Bird was not yet in a position to close, as he and the Purchasing Group had only obtained concessions from three of the four unions, covering four of the five Packaging facilities, and from the salaried management employees. Because of the terms under which concessions were obtained, that all employees and unions must agree to grant the same concessions, the Purchasing Group could not exempt the Petrolia bargaining unit from the concessions requirement, while still holding the other unions to those concessions. The Purchasing Group needed more time, so on May 2, 1997 it obtained a 45 day extension of the stay.

31. Bird continued to try to obtain concessions from the CAW. He asked for a meeting with the head of the CAW, Buzz Hargrove, but was turned down. On Monday, May 12, 1997, Bird, Telfer and Rea met directly with the bargaining unit members and CAW officials to make a plea to them that they agree to the concessions, as had the other unions. Bird told the employees that the facility would close without the concessions. No agreement was reached at this meeting.

32. The Bank continued to pressure the Purchasing Group to close, as the continued operation of Packaging increased the costs and risks to the Bank, as customers of Packaging became aware of its precarious financial status. The customer base was beginning to erode.

33. Finally, on May 14, 1997, it was agreed between the Purchasing Group and the Bank that an assignment in bankruptcy would be made the next day, in order to effect an immediate subsequent sale of Packaging to the Purchasing Group. The deal would proceed without any CAW agreement to concessions, but with an agreement between the Bank and the Purchasing Group that gave the Purchasing Group 14 days from the assignment in bankruptcy to obtain concessions from the CAW, failing which the Petrolia facility was to be liquidated. This contractual arrangement was to be the subject of a separate agreement between the Purchasing Group and the Bank, labelled the “Side Agreement”. The applicant asserts that this Side Agreement was itself an unfair labour practice, and a breach of various sections of the Act. It asserts that agreeing to a requirement to seek concessions from the CAW, during the term of the collective agreement, failing which the Purchasing Group was to close the facility, is an agreement to engage in an unlawful lock-out, and as such contravenes the Act.

34. Telfer, as President and Chief Operating Officer of Packaging, was also a member of the Purchasing Group, and was therefore fully aware that an assignment in bankruptcy would be made the next day. He asked the company's General Manager to phone officials of Local 1008 the evening of May 14, 1997, to ask them to tell their members not to come into work the next day, as there would be an assignment in bankruptcy, and the company would no longer be operating. The salaried employees were phoned by company officials to the same effect. For employees who did attend the next day at the plant, they encountered the closed gates of the company, and were handed a letter by a security guard that advised them that Packaging was in the process of making an assignment in bankruptcy, and that Petrolia was shutting down. This letter stated that employment with the company ceased with the close of business on May 14, 1997.

35. Around 8:30 a.m. on May 15, 1997, the company made a voluntary assignment in bankruptcy. Several hours later, around 10:30 a.m., Packaging appeared before Mr. Justice Houlden of the Ontario Court (General Division) in Bankruptcy on a motion for an order approving, prior to the first meeting of creditors and appointment of inspectors, the sale of the company to Containers and Ontario and to the several other corporate entities created by the Purchasing Group to effect the sale. Virtually all of the assets, tangible and intangible, and property, real and personal, which had been owned by Packaging were to be purchased by the Purchasing Group companies. The Purchasing Group essentially bought the entire business of Packaging: its facilities, machinery and equipment, raw material, finished product, customer lists, goodwill, trademark rights, and so on. The Purchasing Group also signed the "Side Agreement" referred to above.

36. Notice of the motion before the Court was not provided to the CAW, or to any of the potentially affected unions. Mr. Justice Houlden approved the purchase and sale agreements (again, there were several such agreements, as different corporate entities, were utilized by the Purchasing Group to effect the purchase), and ordered that upon completion of the transactions contemplated by the purchase and sale agreements, all rights of the trustee in bankruptcy would vest in the various corporate entities (of the Purchasing Group) free from all unsecured claims. The Court also ordered and declared that "all Vulcan's employees have been terminated at the time of Vulcan's assignment in bankruptcy and that the Trustee shall not be nor be deemed to be a successor employer of Vulcan under the *Labour Relations Act, 1995* (Ontario), the *Employment Standards Act* (Ontario) ... or under any other provincial or federal legislation applicable to employees or pensions, or otherwise.". The Order of Mr. Justice Houlden ended by requesting "the aid and recognition of any Court or administrative body in any province of Canada ... to carry out the terms of this Order ...".

37. The Purchasing Group now owned Packaging, lock, stock and barrel, including the closed Petrolia facility and the four other facilities where the sites remained opened and operating, where employees continued to work without interruption. The Side Agreement required concessions from the CAW by May 29, 1997, or the assets of Petrolia were to be liquidated.

38. The Purchasing Group, now the owner of Packaging, continued to seek concessions, writing the CAW on May 21, 1997, to tell it that Petrolia would open only if the employees ratified the changes to the collective agreement being sought by the new owners. Clearly, Containers and Ontario were of the view that the CAW still held bargaining rights for the Petrolia site, and that the collective agreement would apply if the facility re-opened.

39. Records of Employment were issued to the employees of Petrolia. The Record of Employment filed at the hearing, which the Board takes to be typical of those issued to all employees of Petrolia, lists Packaging as the employer, and May 14, 1997 as the last day worked. In the "Comments" section, the Record notes "Refused offer of employment - 'See attached'", and attached is a page which read:

RECORD OF EMPLOYMENT - COMMENTS SECTION

Petrolia Steel Containers was a division of Vulcan Packaging Inc.

On April 4, 1997, Vulcan Packaging Inc. went into interim receivership.

An Investment Group was interested in acquiring the assets of Vulcan Packaging Inc. and operate them on a "going concern" basis. They made an offer of employment to all the employees, to participate in a restructuring proposal, through the acceptance of temporary wage concessions.

Four of the five unions within the Vulcan organization, plus all salaries staff, accepted the temporary wage concessions. That is approximately 223 out to 280 employees.

The exception was the hourly workers at the Petrolia plant, represented by the C.A.W. Canada, Local 1008. Apparently there was an overwhelming majority that rejected the request for *temporary* wage concessions which would amount to approximately 4.6% per annum.

On May 15, 1997, the assets of Vulcan Packaging Inc. were purchased by the Investment Group out of an Assignment of Bankruptcy.

As the wage concessions, ratified by the other 223 employees in Vulcan were contingent on all unions and salaried staff being treated on an equal basis, the Investment Group could not operate the assets at Petrolia. The other four plants of Vulcan are operating under the new company, Vulcan Containers Ltd.

Accordingly, by the majority of hourly workers (C.A.W., Local 1008) at Petrolia Steel Containers rejecting the restructuring proposal, they, thereby, are rejecting the offer of employment.

40. The applicant submits that the issuance of such Records of Employment, filled out in this manner, constitute breaches of the Act, in that the responding parties were attempting to mislead Employment Canada, by stating that the employee had "refused offer of employment", with the intention of delaying their entitlement to unemployment insurance benefits, in order to pressure them to agree to the concessions.

41. Another meeting of Petrolia employees was held on May 27, 1997, attending by Bird, Charleton and officials of Local 1008. Bird spoke to employees, again asking that they accept concessions. A vote to hold another vote on the issue was defeated.

42. On or about June 2, 1997, the concessions were implemented at locations other than Petrolia. Employees at these locations continued to work as they normally had, without any interruption related to the assignment in bankruptcy or the sale. Employees were not asked to apply or re-apply for employment with the new owners. The same employees went to work at the same facilities, performing the same jobs, and the businesses there were not changed in any meaningful respect. Between May 15th, when the sale closed, and June 2nd, when the concessions were implemented, the terms and conditions of the employees were exactly as they had been prior to the sale. Many of the same managers continued to perform the same jobs they had previously. The bargaining agent at each location continued to act as bargaining agent, without hiatus or change.

43. Finally, some further detail of the individuals who played roles in the various corporate entities is appropriate. The key investors in Containers, the company established by the Purchasing Group to be the parent company for purposes of the purchase of Packaging, were Bird, Rea, Telfer, Bob Pell, and Derrick D'Netto. Bird was the owner of Vulsay, having purchased in 1994 this former division of Packaging. Telfer had been President and Chief Operating Officer of Packaging, Pell had been General Manager of the Montreal Steel Container Division of Packaging, and D'Netto had been Comptroller of Packaging. Pell and D'Netto were performing the same job for Containers. Telfer was

the President of Containers, as he had been at Packaging. Packaging's General Manager (Kaplan), was now General Manager of two of the Packaging divisions.

44. Containers owned all shares in the subsidiary companies, including Ontario. The directors of Containers were Bird, Rea, a lawyer from the firm that had been retained by Bird on behalf of the Purchasing Group, Telfer, and an official from the National Bank. The Chairman and Chief Executive Officer of Containers was Bird.

45. The instant applications were filed on May 26, 1997, and the first hearing date was Friday, May 30, 1997. Notwithstanding the terms of the Side Agreement, which required concessions from the CAW by May 29, 1997 failing which the liquidation of assets of Petrolia were to commence, no liquidation of assets had begun by May 30, 1997, nor for that matter by the time of the last hearing date, June 13, 1997.

Decision

46. The first issues are whether there has been a "sale" to Containers and Ontario, within the meaning of section 69 of the Act, and/or whether they are a single employer, along with Packaging, within the meaning of section 1(4) of the Act. The relevant parts of these sections of the Act read as follows:

1. (4) Where, in the opinion of the Board, associated or related activities or businesses are carried on, whether or not simultaneously, by or through more than one corporation, individual, firm, syndicate or association or any combination thereof, under common control or direction, the Board may, upon the application of any person, trade union or council of trade unions concerned, treat the corporations, individuals, firms, syndicates or associations or any combination thereof as constituting one employer for the purposes of this Act and grant such relief, by way of declaration or otherwise, as it may deem appropriate.

69. (1) In this section, "business" includes a part or parts thereof; ("entreprise")

"sells" includes leases, transfers and any other manner of disposition, and "sold" and "sale" have corresponding meanings. ("vend", "vendu", "vente")

(2) Where an employer who is bound by or is a party to a collective agreement with a trade union or council of trade unions sells his, her or its business, the person to whom the business has been sold is, until the Board otherwise declares, bound by the collective agreement as if the person had been a party thereto and, where an employer sells his, her or its business while an application for certification or termination of bargaining rights to which the employer is a party is before the Board, the person to whom the business has been sold is, until the Board otherwise declares, the employer for the purposes of the application as if the person were named as the employer in the application.

• • •

47. We turn first to the question of whether a "sale" took place. As the Board said in *Deloitte & Touche*, [1993] OLRB Rep. Feb. 109:

15. As has been observed in many of the cases, the definition of sale is quite a broad one including specific reference to the word lease and the very broad phrase "any other manner of disposition". The Board, with judicial approval, has held that in the labour relations context and given the broad wording of the statute, an expanded meaning of the word sale is warranted. In *Thorco Manufacturing Ltd.*, 65 C.L.L.C., para. 16,052, the Board said as follows:

According to its strict signification, the term sells is usually taken to describe a transaction involving the disposal of property by one to another in consideration of a sum paid or agreed to be paid by the recipient in money or its equivalent. As used in section 69, however, the word sells has been given a wide definition which includes lease, transfers and any other manner of disposition of the business or part thereof. In legal parlance the word lease generally denotes a specific kind of contract by which one party, called the lessor, for a consideration in money or its equivalent, confers on another, called the lessee, the exclusive possession of certain property for a period of time.

The word transfers, however, is obviously a term of wide significance and unless restricted by the context is capable of describing a multitude of transactions whether by sale, exchange, gift, trust or otherwise by which property, rights, or interests, etc. are transmitted absolutely, conditionally etc. or by operation of law from one person to another. We are unable to find anything in the language of the section to denote any legislative intention to restrict the meaning of the word transfers to any particular kind of transfer. Also, having regard to the particular language used and the remedial object sought to be attained by and the wide meaning which must be attributed to the preceding word transfers, it is our opinion that the generality of the words any other manner of disposition is not intended to be in any way limited or interpreted ejusdem generis with the words leases, or transfers. In our opinion, it is more in harmony with the language of and the remedy envisaged by the enactment to interpret the words and any other manner of disposition as an omnibus or saving provision intended to include dispositions of the business or a part or parts thereof by any mode or means whatever which are not appropriately described by the preceding words which state that sells includes leases or transfers.

It is a rudimentary principle applicable to the construction of remedial legislation that, consistent with the language of the enactment, the interpretation which must be adopted is the one which best serves to advance the remedy and to suppress the mischief contemplated by the legislation. (See also section 10 of *The Interpretation Act* R.S.O. 160 c. 191). Having regard to this principle and to the fact that the language of the section is entirely susceptible of and in agreement with such a meaning, we are impelled to give the section a large and liberal rather than a narrow or restrictive construction.

16. In writing for the Divisional Court in *Re Hughes Boat Works Inc. and U.A.W.*, (1979) 26 O.R. (2d) 420 at 432, Mr. Justice Reid commented as follows:

Was the interpretation made of s. 69 by the Ontario Labour Relations Board unreasonable? There were two factors to which the Board made special reference. The first was the expanded meaning of the word "sale". "Sale" is used in the statute in a special sense, a much wider sense than it is ordinarily accorded. In ordinary parlance a lease is not a sale. As used in s. 69, however, sale includes lease. The inclusion of a meaning that is in a sense the very opposite to the ordinary meaning of the word "sale" suggests to me that the Legislature intended a very broad meaning indeed for the word "sale" in s. 69. This makes irrelevant a good many of the decisions relied on by [the] applicant in which Courts were called on to interpret the word "sale" in other contexts.

Thus, "sale or other manner of disposition" means something very different in the labour relations context of a sale of a business than it does in its ordinary or commercial law sense. Labour relations considerations must govern when interpreting section 69.

17. It is clear then that, in applying the section to the facts before us, the labour relations purpose must be kept in mind. This was discussed in *C.U.P.E. v. Metropolitan Parking Inc.*, [1980] 1 Can. LRBR 206, in part, as follows:

It is important to emphasize, however, that section [69] of the Act has never been regarded merely as an "unfair labour practice" provision, directed at schemes designed to subvert bargaining rights. The section is also intended to preserve bargaining rights in the case of *bona fide* business transactions (i.e., transactions undertaken for purely commercial reasons and untainted by any anti-union motivation) which *incidentally*

undermine the industrial relations *status quo*. This two-fold purpose was discussed by the Board in *Aircraft Metal Specialists Ltd.*, [1970] OLRB Rep. Sept. 703:

The purpose of section [69] becomes important in assessing the various fact situations that arise. Section [69] operates on a number of levels. The first level, of course, is to prevent the subversion of bargaining rights by transactions which are designed to get rid of the union. We have encountered situations where there are transactions between various corporate entities which are in effect “paper transactions”, and are a form of corporate charade engaged in for the purpose of eliminating the trade union. In this type of case the Board has liberally interpreted section 69 to preserve the bargaining rights and has attempted to look beyond “paper transactions” to achieve that purpose. See e.g. *Kem’s Masonry*, December 1964, OLRB Mthly. Rep. 382 and *Trenton Riverside Dairy*, September 1964 (1964) 2 C.L.S. 76-1005.

A further and important purpose of section [69] is to preserve the bargaining rights with respect to work which has accrued to the benefit of the employees as a result of their union becoming the bargaining agent through certification or voluntary recognition. Once the union had been recognized with respect to a particular business the union then obtains a right to bargain with respect to wages, hours and other conditions of employment in that business. The right to participate in the business and its functions in that manner is in the nature of a vested right and section [69] allows the union to pursue the bargaining right when all or part of the business is sold. In making determinations under section [69] therefore, the Board is interested in maintaining the bargaining rights where the sale involves a continuum of the business.

In recent years most of the litigation before the Board has involved increasingly complex, but *bona fide*, business transfers which result in the same kind of dislocation as a simple bilateral sale. Collusive arrangements, or transactions explicitly designed to subvert bargaining rights, have become much less common; and can, in any event, be dealt with under sections [72], [73], and [76] of the Act.

48. Packaging made an assignment in bankruptcy, and within hours, sought and obtained court approval for a sale of the business to the Purchasing Group, which included both Containers, the parent company for the various other corporate entities set up by the Purchasing Group, and a subsidiary entity, Ontario. The bankruptcy was a vehicle for divesting Packaging of its debts, to the extent effectuated by the assignment. The debts extinguished or nullified included all monies owed to unsecured creditors. The sale was the culmination of a set of restructuring transactions, beginning in April with the appointment of EYI as Interim Receiver, and ending with the court approved sale from the Trustee to Containers and Ontario.

49. Most of the key players who composed the Purchasing Group became key people with Containers and Ontario, and had previously been key players with Packaging. Telfer had been the sole shareholder and director of Packaging, and had been its Chief Executive Officer and President. He became a shareholder and director of Containers, and the first President of the new company. Bird had purchased and still owned one of the former divisions of Packaging, Vulsay. Pell and D’Netto had been officers of Packaging and were now officers of Containers or one of the subsidiary companies. Nearly all the key officers of Packaging continued as officers of Containers or one of the subsidiary companies.

50. The Purchasing Group bought Packaging as an ongoing business, with the intention of continuing to operate the company as it had operated in the past. The Purchasing Group intended that at all five locations or facilities the same employees would do the same work, producing the same product, for (at least) the same customers, using the same steel supplier. Indeed, the Purchasing Group could not have secured the steel supply without making good on the predecessor’s debt obligations to it. For four of the locations the intended plan prevailed. The business continued as it always had, with

no hiatus and no meaningful change in employees, management, or the key players who had operated the predecessor. Telfer still ran the company, albeit subject to Bird's overriding supervision and control, aided by the former key officers of Packaging - Pell, D'Netto and Kaplan.

51. EYI, which acted at different times as Interim Receiver or Trustee, is not named as a responding party, nor is it asserted that it is a successor or related employer. No remedy is sought against it. The CAW asserts that the business essentially transferred from Packaging to the Purchasing Group, with a momentary bankruptcy designed to eliminate some of the debt structure of the re-invented company, while leaving the true ownership of the company in many respects unchanged. EYI was merely a temporary stepping stone between corporate structurings.

52. The Purchasing Group itself believed that the collective agreements would still apply (prior to this litigation commencing), and it continued to apply them to all locations other than Petrolia. It continued to recognize the unions as the bargaining agents at all locations. It cannot seriously be maintained, on the facts, that employees at the four locations that continued in business as before were somehow "new employees", who somehow re-applied for employment, nor can it be maintained that the responding parties merely voluntarily recognized bargaining rights in the unions. All participants in the transactions, the Purchasing Group and its constituent corporations, the unions and the employees, acted as if the bargaining rights and labour relations obligations continued through the sale.

53. Containers and Ontario assert, however, that there was no "sale" with respect to the Petrolia facility. The employees there were terminated, they submit, by operation of law consequent upon the assignment of bankruptcy, and the collective agreement was inoperative for the same reason. All that the Purchasing Group "bought" in Petrolia was a closed and dormant facility. Containers had no employees, it asserts, at that location and there was no "sale" of an ongoing business at that site, only of the assets of a already closed down business.

54. Dealing first with the argument that there was a sale only of a dormant site, the short answer is that if there was a sale of the business from Packaging to the Purchasing Group, then on the facts the "sale" included the Petrolia location, whether it was open for business or dormant at the time of the sale. Bird tried to obtain permission from the Bank to purchase Packaging except for its Petrolia facility, given the unwillingness of the bargaining unit there to agree to the concessions already agreed to by the other unions, and without which, he believed, the continuation of the Petrolia facility as an ongoing concern was impossible. The Bank refused to exempt Petrolia from the deal, so the Packaging Group bought the business at that location also. The new owner still continues to want to re-open Petrolia and continue Packaging's business there, in the same manner as it conducted that business before. If a "sale" has occurred, then the Petrolia location is part of that sale, part of the "business" bought by the Purchasing Group.

55. Unless it can be said that the provisions of the *Bankruptcy and Insolvency Act*, the assignment in bankruptcy itself or the Court order approving the sale to the Purchasing Group, ousts the jurisdiction of this Board to decide whether there has been a "sale", or requires a finding by this Board that a sale has not occurred, then the Board is satisfied that a "sale" did occur within the meaning of section 69 of the Act, and both Ontario and Containers are successor employers. The ongoing business of Packaging, all its meaningful assets, tangible and intangible, have been purchased with the intention of continuing to run the business that operated before. And that is what the purchasers have done. Except for Petrolia, the balance of the business continues to run in the same manner, in virtually all meaningful respects, under the new owners. This is a classic case of a "sale".

56. Do any aspects of the bankruptcy events negate this conclusion? The assignment in bankruptcy was a legal artifice for purposes of cancelling or reducing debt liabilities. What motivated the transaction was the intent of Packaging, the Purchasing Group and the Bank, that the Purchasing Group

buy and operate the business of Packaging. EYI as Interim Receiver actively dealt only with the financial aspects of the business of Packaging, including supervision of accounts receivable and payable, and securing a continued short term steel supply from Dofasco pending the sale. In other respects, it served a monitoring function. Subsequently, as Trustee in Bankruptcy, it occupied that position for a brief period measured in hours, and only in order to facilitate the sale to the Purchasing Group. It played no role as such in the operation of the company. From the perspective of section 69 of the Act, and the labour relations issues at play in the circumstances, the Purchasing Group for practical purposes bought the company from Packaging and the Bank.

57. The responding parties did not assert that the Board has no jurisdiction. The Court orders (assuming the court in the circumstances here would have the jurisdiction to make an order binding upon the Board with respect to the exercise of the Board's exclusive jurisdiction under sections 1(4) and 69 of the Act) only precluded an order that the *Trustee* be found to be a successor employer. As noted, the Trustee is not a responding party, nor is an order sought against it.

58. The responding parties do assert however, that the Board cannot find that a "sale of a business" occurred at Petrolia, since the assignment in bankruptcy terminated the employees and the collective agreement applicable to that location. At most, they submit, only a dormant facility was bought, a sale of a closed facility without employees and without individuals who retained any employment relationship there, and without a collective agreement which applied to that facility (it is noteworthy that this same argument, that there were no employees and no collective agreements in effect, was not maintained with respect to the other facilities). If the responding parties are correct, and there is no collective agreement in effect, that fact may have relevance for whether the Board will find that a "sale" has occurred, and for whether bargaining rights continue to exist.

59. In *St. Marys Paper Inc.*, 26 C.B.R. (3d) 273 (1994), the Ontario Court of Appeal had to consider an issue under the *Pension Benefits Act* (Ontario), and determine whether the Trustee in Bankruptcy became an "employer" of the workers in question for purposes of the *Pension Benefits Act*. In considering this question, the majority (Arbour and Osborne, JJ.A.) stated that "the bankruptcy had terminated their employment" (at page 277) and that the Trustee had "sought to hire" the former employees (page 278). Both statements were made in passing, with no analysis or explanation of how or why the assignment in bankruptcy would have this effect. In dissent, Madam Justice Abella stated her view that (a) the Ontario Labour Relations Board has exclusive jurisdiction to deal with the issue of successor employer, and (b), that "contracts of employment with employees, including collective agreements, terminate with a bankruptcy" (at page 291). As with the majority statements, no analysis or support for this proposition was provided. It is therefore unclear, with respect, whether the majority decision stands for the proposition that employees are terminated by an assignment. The comment to this purpose was not part of the ratio and was not a finding made by the court. As well, the majority made no comment on whether the collective agreement terminated because of the bankruptcy.

60. A different panel of the Court of Appeal issued a decision in *Rizzo & Rizzo Shoes Ltd.* (1995) 30 C.B.R. (3d) 1. This dispute was over a claim under the *Employment Standards Act*, and the unanimous Court concluded that employment ended upon a receiving order in bankruptcy issuing against the employer, after a petition from one of its creditors. The bankruptcy in question there was the result of creditor actions and not a voluntary bankruptcy sought by the employer itself. At page 9 therein, the Court stated:

In *Re Kemp Products Ltd.* (1978), 27 C.B.R. (N.S.) 1 (Ont. S.C.), Registrar Ferron heard an appeal from a trustee's disallowance of a claim for severance pay as an ordinary unsecured creditor, as in the case now before the court. At p. 4 he said:

In addition, I am of the opinion that the bankruptcy of the company at the instance of a creditor does not constitute a dismissal although the employment relationship is thereby terminated.

I agree with that statement. He went on to say:

It might be otherwise if the bankruptcy had resulted from an assignment in bankruptcy at the instance of the company.

As the case before us does not involve a voluntary assignment, there is no need to comment on that additional statement.

The Court made no comment about the earlier decision in *St. Marys Paper Inc.* This case is not therefore of particular assistance.

61. In *Grosvenor Health Care Partnership (No. 2)* (1995) 33 C.B.R. (3d) 28, the Ontario Court of Justice (General Division) in Bankruptcy, per Spence J., did comment on *St. Marys Paper*. A Trustee in Bankruptcy had been appointed to three companies involved in the operation of a nursing home. The union representing employees sought leave of the Court to continue certification proceedings that had been initiated against the Trustee, under the *Labour Relations Act, 1995* and the *Hospital Labour Disputes Arbitration Act* (Ontario). Mr. Justice Spence had to consider the Board's jurisdiction under what is now section 69 of the Act and its apparent (to the Court) conflict with the provisions of the *Bankruptcy and Insolvency Act*. He wrote (at page 32):

A determination to that effect would be apparently inconsistent with the rule in bankruptcy law that the collective agreement terminates on the occurrence of the bankruptcy: *Re St. Marys Paper Inc.* (1994), 26 C.B.R. (3d) 273 (Ont. C.A.), at p. 291 per Abella J.A.: "Contracts of employment with employees, including collective agreements, terminate with a bankruptcy." Such a determination would also be apparently inconsistent with the provision in the order of Mr. Justice Houlden of December 14, 1994 which provides that the trustee is not to be, and is not to be deemed to be a successor employer under the OLRA.

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With respect to the request for leave, I think a delicate balancing of the relevant considerations is required. The Board clearly has jurisdiction under the OLRA to make a determination that there has been a sale of a business and that PMTI is a successor employer. The considerations which have been raised here concerning the apparent inconsistencies between a positive determination to that effect and bankruptcy principles and the order of December 14, 1994 could presumably be considered in those proceedings to the extent germane and in any other proceedings that may be taken in this matter. The courts should ordinarily defer to the Board on a matter clearly within its statutory jurisdiction. On the other hand, if a decision were taken by the Board against the trustee, it would involve the inconsistencies mentioned above. It would be incompatible with the termination of the collective agreement as a result of the bankruptcy and the limited role of a trustee in bankruptcy in carrying on a business. ...

62. The Court appears to adopt Abella, J.'s *dissent* on the point as law, with no apparent recognition that she wrote her comments in dissent. It is unclear whether the Court in applying her statements realized that they were the dissenting views. In any event, the applicant there was seeking leave to continue or bring an application against the *Trustee*, which is not the case here. We do not find this decision to be authority for the proposition being proffered, that a voluntary assignment in bankruptcy, by operation of law, terminates all employees and the collective agreement.

63. In *Associated Freezers of Canada Inc.* (1995) 36 C.B.R. (3d) 36, the Nova Scotia Supreme Court (In Bankruptcy) dealt with the same question, whether a Trustee was a successor. That Court did clearly hold that upon bankruptcy all employment was terminated, relying on *Rizzo*, (above, where the Court specifically declined to comment on the consequences of a voluntary bankruptcy), and stating

that “with no employment there can be no collective agreement”. Under Ontario labour relations law, this proposition is clearly wrong. The lack of employees at any point in time does not terminate, nullify, or invalidate a collective agreement. It is difficult, therefore, to give any weight to this statement of the court.

64. It is upon these authorities that the responding parties base their argument that the bankruptcy of Packaging terminated the employees of Packaging based at Petrolia and terminated the collective agreement covering Petrolia. With respect, however, in our view those decisions do not mandate such a conclusion, nor does the Board reach such a conclusion.

65. There are several reasons for this. First, the employees at Petrolia had already been terminated by Packaging, effective the evening of May 14, 1997, a time prior to the assignment in bankruptcy. There appears to have been no legal impediment to their termination that evening by Packaging, although such termination would have been subject to the terms of the collective agreement and the requirements of any applicable legislation. Second, the cases relied upon above do not arise in the context of a voluntary assignment of bankruptcy, the bankruptcy that occurred here, and the Court in *Rizzo* (above) specifically declined to comment on the effect of such an assignment. Third, the Court’s views in *Grosvenor* (above) appeared to be based on the misconception that Abella J. spoke for the Court in *St. Marys Paper* (above) rather than writing in dissent. Fourth, the statements made by the various courts referred to above offer no analysis to justify the conclusion that the bankruptcy terminates employees or the collective agreement. There is no reference to a relevant section of the *Bankruptcy and Insolvency Act* or any other legislation which would suggest, require or justify such a finding.

66. This latter point is of significance. The *Bankruptcy and Insolvency Act* is a federal statute dealing with rights and obligations involving debtors and creditors. Its thrust is directed towards commercial events, and it deals with situations where financial obligations to creditors are suspended or cancelled, and debtors are protected from claims for monies owed. Bankruptcy itself creates a situation where, by operation of law under that statute, a debtor may be able to continue in business after discarding some or all of its prior financial burdens.

67. The *Labour Relations Act, 1995* deals with statutory rights in a labour relations environment, not contractually based commercial rights, and the Act establishes a series of statutory obligations and protections which are designed to grant rights to employees, unions, and employers. These rights include the right of a union to apply to be the exclusive bargaining agent for a group of employees, and the right of employees to freely choose whether they wish to be so represented. Employees are protected from actions by their employers that penalize them for exercising or purporting to exercise their rights under this Act. Generally speaking, commercial matters and the collection of money from debtors, or the extinguishment of debts, are not matters within the purview of the Act.

68. The two very different statutory purposes in these two pieces of legislation *may* collide, but it is neither apparent that they do, in a general sense, nor that they have in the particular scenario here. Any “sale” or “related employer” finding would serve to further the statutory purposes of the *Labour Relations Act, 1995*. A declaration in this respect would not appear to detract in any manner from the *Bankruptcy and Insolvency Act*, for there does not appear to be any operating inconsistency between the two statutory regimes. The bankruptcy is still effective, and Packaging remains, to our understanding, a company in bankruptcy, and its creditors remain subject to the terms of the bankruptcy. A decision that a “sale” took place would not render Packaging liable for debts which were suspended or nullified by its petition into bankruptcy, nor would a finding under section 1(4) render Packaging liable for debts from which it had been absolved, since such a declaration would mean that the responding parties were “one employer for purposes of this Act” (i.e. *Labour Relations Act, 1995*), not for purposes of the *Bankruptcy and Insolvency Act*. While Ontario and Containers would be liable for Packaging’s labour

relations debts, by virtue of such declarations, such liability is not incompatible with the bankruptcy proceedings or the effect of the provisions of the *Bankruptcy and Insolvency Act*.

69. Or at least there is no intuitive or obvious labour relations reason why such an inconsistency or conflict would exist. The complete lack of analysis or explanation by any of the courts quoted above as to why or how the fact of bankruptcy nullifies the employment status of every employee and terminates all collective agreements under the *Labour Relations Act, 1995*, sheds no light on this debate. The courts merely asserted this to be so, and this bald assertion, that bankruptcy automatically has such an effect under this Board's constituent statute, in an area over which this Board is statutorily given *exclusive* jurisdiction, is not particularly helpful.

70. Even if, for purposes of the *Bankruptcy and Insolvency Act*, a voluntary assignment in bankruptcy has the result that employees are terminated, it does not follow, and we reject the contention, that an employee in those circumstances would also be terminated for purposes of the *Labour Relations Act, 1995*. This latter finding falls within the Board's exclusive jurisdiction to determine, as does the question of whether a "sale" occurred under our Act. We can see no sound labour relations rationale for concluding that a bankruptcy ends employment status under the Act. Such a finding would effectively nullify all rights under section 69 of the Act, where bankruptcy occurs, a result quite inconsistent with the thrust and purpose of the section, and the statutory rights created therein, and unnecessary to protect the creditor rights and asset distribution features of the bankruptcy insolvency legislation.

71. Finally, on this point, the Board does not find that the specific order of Mr. Justice Houlden terminated the employment of the already terminated employees of Petrolia, for purposes of the *Labour Relations Act, 1995*. As the Board in *Deloite* (above) said:

20. Some attention was given to paragraph 5 of the order which reads as follows:

5. **THIS COURT ORDERS** that the Receiver shall be at liberty to appoint an agent or agents (including an independent manager of the Property) and such assistants (including barristers and solicitors, and any of the servants, employees, officers and directors of the Defendant) from time to time as it may consider necessary for the purpose of preserving the Property and carrying on the business of the Defendant relating to the Property and performing any of its duties and powers hereunder, *provided however that the employment or retention of any employee of the Defendant shall not constitute the Receiver as a "successor employer" to the Defendant or any of its affiliates or otherwise make the Receiver liable for obligations of the Defendant or any of its affiliates to their employees.*

[emphasis added]

It is our view that this provision cannot be determinative in this case. It is the Board's exclusive jurisdiction to determine whether there has been a sale for labour relations purposes. The respondent cannot be relieved of its statutory obligations under the Act by the above term of the Order, and it is not apparent that was the intended effect. In any event, the Board would not be of the view that retention of any employee or employees (which is the extent of the above provision) would alone constitute the receiver and manager a successor employer in any event. The retention of employees is a factor to be considered, particularly on the question of whether the business has continued. (See also the comments of the Board in *CUPE v. Metropolitan Parking*, *supra*, to the effect that the retention of employees is only one factor to be considered and is not necessary to a finding of a sale. If it were otherwise, the simple expedient of not retaining employees would avoid the section). In any event, as noted above, it is conceded that the business has continued, and thus the question of the retention of employees is not central to the current case.

72. The Board therefore concludes that there has been a "sale" of a business, within the meaning of section 69 of the Act, from Packaging to the two other responding parties. Nothing in the *Bankruptcy and Insolvency Act*, the assignment in bankruptcy, or the orders of Mr. Justice Houlden, leads the Board to a different conclusion. Both Containers and Ontario are therefore bound to the applicable collective

agreement and “step into the shoes” of the predecessor. As the Board said in *Emrick Plastics Inc.*, [1982] OLRB Rep. June 861:

17. The interpretation given to its successorship legislation by the British Columbia Labour Relations Board makes eminent good sense to this Board as well. Collective bargaining legislation is designed primarily for the benefit of employees, not trade unions. Can it really be said that the Legislature in enacting section [69] of our own Act intended that the rights of the bargaining agent selected by the employees would “run with the business” (cf., for example, *Marvel Jewelry*, [1975] OLRB Rep. Sept. 733), that the collective agreement bargained for and ratified by those employees would run with the business, but that the very employees who had made these choices would not? The Board would need unmistakable language in its statute to come to that conclusion. The only tangible difference in the language of the B.C. Code in its material provisions is that the British Columbia statute says:

... where a collective agreement is in force, it continues to bind the purchaser ... to the same extent as if it had been signed by him.

whereas our own statute says:

... the person to whom the business has been sold is, until the Board otherwise declares, bound by the collective agreement, as if he had been a party thereto.

But the words of the Ontario Supreme Court in *Cassin-Remco*, *supra*, paraphrasing our statute to say that “the purchaser of a business shall be deemed to be the *original* signatory to the collective agreement” leave no doubt (if there was any) that this is a distinction without a difference.

18. We conclude, similar to the British Columbia Labour Relations Board, that section [69](2) of our own Act continues the effect of a collective agreement over a sale transaction *without hiatus*, and that the purchaser stands literally in the shoes of its predecessor with respect to any rights or obligations under that agreement. The purchaser, in other words is given no opportunity to “weed out undesirable employees” contrary to the provisions of the collective agreement, nor to decline to recognize any of the seniority or other rights accrued by employees under the collective agreement during their tenure with the predecessor employer. We agree with counsel for the respondent that the purchaser takes the business *exactly* as he receives it from the vendor. Even if, for example, employees have been given notice of termination by the vendor, the purchaser is no more entitled to start that business up without regard to the recall rights of employees under the collective agreement than the *vendor* would have been. The obligations of neither employer are determined by whether the employer on its own chose to treat a severance at a given point in time as a termination or a lay-off.

73. We turn next to a consideration of whether the responding parties Containers and Ontario are a single employer, along with Packaging, for purposes of the Act. In *Roy Brandon Construction*, [1981] OLRB Rep. Feb. 219, the Board wrote as follows:

9. The two businesses, in other words, although unrelated in time, may be so identical in their essential makeup as to be considered “associated or related” within the purpose and meaning of section 1(4) (although there may be a point at which the hiatus is so significant that it would be inappropriate to say that the section applies). As the Board also noted in *Brant Erecting*, the presence of bad faith, or the intention to avoid bargaining rights, is not a pre-requisite to the section applying. The absence of bad faith is, rather, something which the Board may take into account in deciding the extent to which it finds it appropriate to exercise its discretion, having regard to the labour relations purposes of the section.

10. In the *Brant Erecting* case the predecessor company was dissolved without any formal act of bankruptcy. The Board in the present case, therefore, must decide whether the intercession of an assignment in bankruptcy has any effect on the application of section 1(4). Since section 1(4) does not turn on any flow-through or transfer of assets or goodwill, or even on continuity of operation, the answer appears to be that it does not. Were it otherwise, the principals of a company by declaring bankruptcy (with whatever loss to creditors) would find themselves in a better position vis-a-vis the union than if they had not. The language of the section does not appear to contemplate or

support such a distinction. In a bankruptcy, of course, certain rights are extinguished by the Court's final order of discharge. It is doubtful, though, whether even the final order of discharge, any more than the winding-up or dissolution of a corporation (with its limited liability), would prevent the operation of section 1(4). The present case, however, need not decide that. Here Roy Brandon Construction and Roy Brandon Limited in fact commenced to carrying on business before the final order of discharge for Brandon General Contractors Limited was made. The Board, having regard to the "essential unity and identity" of their economic organizations, together with their common direction and control, is prepared to treat Roy Brandon Limited, Roy Brandon Construction, and Brandon General Contractors Limited as one employer for the purposes of the Act.

74. In *Economy Store Fixtures Limited*, [1992] OLRB Rep. May 575 the Board wrote:

12. Section 1(4) of the *Labour Relations Act* provides that:

1.-(4) Where, in the opinion of the Board, associated or related activities or businesses are carried on, *whether or not simultaneously*, by or through more than one corporation, individual, firm, syndicate or association or any combination thereof, under common control or direction, the Board may, upon the application of any person, trade union or council of trade unions concerned, treat the corporations, individuals, firms, syndicates or associations or any combination thereof as constituting one employer for the purposes of this Act and grant such relief, by way of declaration or otherwise, as it may deem appropriate.

(emphasis added)

Section 1(4) is a remedial provision intended to prevent the intentional or incidental erosion of bargaining rights consequent upon changes in structure or form of what is, for labour relations purposes, a single business activity. To put it another way, whatever separation may exist between two or more entities for corporate, tax or other purposes, this Board is entitled to treat them as one employer for purposes of the *Labour Relations Act* where such entities carry on associated or related activities or businesses under common control or direction. The purpose of the provision is to prevent form, or an alteration in form, from undermining a trade union's bargaining rights and the rights of employees to bargain collectively with their employer through that trade union. As the Board observed in *Brant Erecting and Hoisting*, [1980] OLRB Rep. July 945 and October 1353, section 1(4) extends to situations where one business entity is actively carrying on business and another is not:

15. ... It is not necessary to have shared participation in a common business endeavour or even contemporaneous economic activity. The relationship between the business entities is a functional rather than a temporal one. Businesses or activities are "related" or "associated" because they are of the same character, serve the same general market, employ the same mode and means of production, utilize similar employee skills, and are carried on for the benefit of related principals. If these criteria are met, two businesses may be "related" within the meaning of section 1(4) even though their activities are carried on through different or corporate vehicles and are not carried on simultaneously. It is evident that the Legislature has created a regime of collective bargaining law which significantly modifies the common law notions of "privity of contract" or "the corporate veil".

(See also, *Metro Century Construction Ltd.*, [1983] OLRB Rep. July 1122.)

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14. The fact that there was a hiatus between the time Frid controlled and directed Economy and the birth of Flair does not detract from the fact that Economy and Flair are more than one entity engaged in a related activity or business under common control and direction, the key in that latter respect being Frid. As we have already noted, section 1(4) of the Act specifically provides that associated or related activities or businesses can be treated as constituting one employer for purposes of the Act even when they are not operating at the same time. The mere fact that an employer for whose employees a trade union holds bargaining rights ceases to operate will not cause those bargaining rights to disappear or become inert. If another entity controlled or directed

by a person (or other entity) which exercised control or direction over the first one subsequently becomes engaged in an associated or related activity or business, the bargaining rights which attached to the first employer will also attach to the second, unless there are compelling labour relations reasons why they should not. Under the *Labour Relations Act*, bargaining rights attach to an activity or business, not merely to the legal vehicle through which the activity or business is carried on. Alterations in legal form, whatever the reasons or motivation for them, are not allowed to undermine or frustrate existing bargaining rights, either directly or incidentally.

15. On the evidence before the Board, Frid appears to be the key player in Flair. It appears that for all practical labour relations purposes he controls and directs that company (indeed, there was no real suggestion that he does not). In our view, Flair is, in effect, Economy reborn. And Flair, like Economy, is the vehicle for Frid's business activity, an activity in which others have joined but primarily his nonetheless. Although it operates on a smaller scale, Flair is objectively indistinguishable from Economy for labour relations purposes. It is in the same business, operates from the same location, uses the same equipment, and its customers, with a few very minor exceptions, are the same as Economy's. And, just as Economy was under Frid's managerial control, so now is Flair.

16. Finally, the applicant/complainant's bargaining rights are at risk of disappearing along with Economy. This is precisely the sort of erosion of bargaining rights which section 1(4) of the Act is designed to prevent.

75. Here, given the fact that many of the key people are the same for Packaging and the Purchasing Group, (Containers and Ontario), both as operating officers of the three companies and as directors, given that the 100% shareholder of Packaging (Telfer) is a key member of the Purchasing Group and given that the business has not changed in any material respect, it is apparent that these corporations have acted together as one employer. While the legal ownership of Packaging has changed, in the sense that the majority shareholder has changed from Telfer to Bird, the key people structured the sale through a bankruptcy, and the same group of people still operate what in essence is the same business. Although Packaging was the legal employer prior to the bankruptcy and sale, the Bank was effectively dictating how it operated, with the meaningful input of the Purchasing Group. It was the Purchasing Group that was negotiating concessions with the unions, not Packaging, at a time when the Purchasing Group was not the employer. For practical purposes, it was the Purchasing Group (as prompted by the Bank) that would have initiated the termination of the Petrolia employees by Packaging on May 14, 1997. The three named responding parties are intertwined in their labour relations activities and in the manner in which they conducted their businesses. These businesses were one and the same, and the business of Packaging and now that of Containers and Ontario, were under the common control and direction of Bird, Telfer and the rest of the Purchasing Group, for some considerable time prior to the assignment in bankruptcy and sale of May 15, 1997, and after the sale was completed.

76. The Board therefore finds that Packaging, Containers, and Ontario are a single employer within the meaning of section 1(4) of the Act.

77. The Board turns now to the unfair labour practices. The relevant sections of the Act read as follows:

1. (1) In this Act,

"lock-out" includes the closing of a place of employment, a suspension of work or a refusal by an employer to continue to employ a number of employees, with a view to compel or induce the employees, or to aid another employer to compel or induce that employer's employees, to refrain from exercising any rights or privileges under this Act or to agree to provisions or changes in provisions respecting terms or conditions of employment or the rights, privileges or duties of the employer, an employers' organization, the trade union, or the employees.

17. The parties shall meet within 15 days from the giving of the notice or within such further period as the parties agree upon and they shall bargain in good faith and make every reasonable effort to make a collective agreement.

70. No employer or employers' organization and no person acting on behalf of an employer or an employers' organization shall participate in or interfere with the formation, selection or administration of a trade union or the representation of employees by a trade union or contribute financial or other support to a trade union, but nothing in this section shall be deemed to deprive an employer of the employer's freedom to express views so long as the employer does not use coercion, intimidation, threats, promises or undue influence.

72. No employer, employers' organization or person acting on behalf of an employer or an employers' organization,

- (a) shall refuse to employ or to continue to employ a person, or discriminate against a person in regard to employment or any term or condition of employment because the person was or is a member of a trade union or was or is exercising any other rights under this Act;
- (b) shall impose any condition in a contract of employment or propose the imposition of any condition in a contract of employment that seeks to restrain an employee or a person seeking employment from becoming a member of a trade union or exercising any other rights under this Act; or
- (c) shall seek by threat of dismissal, or by any other kind of threat, or by the imposition of a pecuniary or other penalty, or by any other means to compel an employee to become or refrain from becoming or to continue to be or to cease to be a member or officer or representative of a trade union or to cease to exercise any other rights under this Act.

76. No person, trade union or employers' organization shall seek by intimidation or coercion to compel any person to become or refrain from becoming or to continue to be or to cease to be a member of a trade union or of an employers' organization or to refrain from exercising any other rights under this Act or from performing any obligations under this Act.

79. (1) Where a collective agreement is in operation, no employee bound by the agreement shall strike and no employer bound by the agreement shall lock out such an employee.

(2) Where no collective agreement is in operation, no employee shall strike and no employer shall lock out an employee until the Minister has appointed a conciliation officer or a mediator under this Act and,

- (a) seven days have elapsed after the day the Minister has released or is deemed pursuant to subsection 122(2) to have released to the parties the report of a conciliation board or mediator; or
- (b) 14 days have elapsed after the day the Minister has released or is deemed pursuant to subsection 122(2) to have released to the parties a notice that he or she does not consider it advisable to appoint a conciliation board.

(3) If a collective agreement is or has been in operation, no employee shall strike unless a strike vote is taken 30 days or less before the collective agreement expires or at any time after the agreement expires and more than 50 per cent of those voting vote in favour of a strike.

(4) If no collective agreement has been in operation, no employee shall strike unless a strike vote is taken on or after the day on which a conciliation officer is appointed and more than 50 per cent of those voting vote in favour of a strike.

(5) Subsections (3) and (4) do not apply to an employee in the construction industry.

(6) No employee shall threaten an unlawful strike and no employer shall threaten an unlawful lock-out of an employee.

(7) A strike vote or a vote to ratify a proposed collective agreement or memorandum of settlement taken by a trade union shall be by ballots cast in such a manner that persons expressing their choice cannot be identified with the choice expressed.

(8) All employees in a bargaining unit, whether or not the employees are members of the trade union or of any constituent union of a council of trade unions, shall be entitled to participate in a strike vote or a vote to ratify a proposed collective agreement or memorandum of settlement.

(9) Any vote mentioned in subsection (7) shall be conducted in such a manner that those entitled to vote have ample opportunity to cast their ballots. If the vote taken is otherwise than by mail, the time and place for voting must be reasonably convenient.

82. No employer or employers' organization shall call or authorize or threaten to call or authorize an unlawful lock-out and no officer, official or agent of an employer or employers' organization shall counsel, procure, support or encourage an unlawful lock-out or threaten an unlawful lock-out.

83. (1) No person shall do any act if the person knows or ought to know that, as a probable and reasonable consequence of the act, another person or persons will engage in an unlawful strike or an unlawful lock-out.

(2) Subsection (1) does not apply to any act done in connection with a lawful strike or lawful lock-out.

78. There are four actions or series of actions engaged in by the responding parties which are said to be unfair labour practices. First, the failure of Packaging, during negotiations with the CAW in the fall of 1996, to disclose to the applicant its serious financial problems, the fact that a sale was being contemplated, and the fact that bankruptcy was a potential option, constituted breaches of section 17 of the Act. Second, the statements made by Packaging on the Records of Employment for terminated employees, that employees had "refused offers of employment", breached numerous sections of the Act. Third, the signing of the Side Agreement between Containers and Ontario, and the Bank, under which the Petrolia assets were to be liquidated within six months of closing, unless concessions were obtained from the CAW within 14 days of the sale, constituted a breach of numerous sections of the Act. Fourth, the closure of Petrolia was an "unlawful lock-out", since it was designed to compel the employees and the union to agree to changes in the terms and conditions of the collective agreement at a time when a lock-out was not timely and was therefore not permitted. The applicant asserts that the failure of the new owners to re-open the facility constitutes part of the same unlawful lock-out.

79. The first aspect focuses on the negotiations leading up to the current collective agreement. There was very little evidence of the negotiations, presumably because the parties were focused on the "lock-out" or closure events. The Board had no evidence of the number of negotiating sessions, when they occurred, who was present for Packaging, the detail of most of the statements made, including statements about financial information and financial issues. The allegation rests upon the company's lack of disclosure, but with little context on content of the negotiations provided to the Board.

80. At the time negotiations were taking place, Packaging had been in serious financial difficulty for many years, and the CAW was aware at least of some of those difficulties. For example, the CAW had become aware of the company's attempts to financially re-organize itself in 1993 and 1994, and had been aware of the company's very serious and tenuous financial stability.

81. In negotiations, the company told the CAW that it could not give wage increases, as it could not afford them. It said nothing about any re-structuring, bankruptcy, sale, or closing. At that point, Packaging had no intention of closing Petrolia. To the contrary, the negotiations the Purchasing Group was having with the Bank were designed to allow Petrolia to continue to operate, without any temporary closures or loss of employment. There was no contemplation of bankruptcy at that point, only an avid interest from the Purchasing Group, reinforced by the Letter of Intent the Purchasing Group had signed with the Bank in June, 1996. Negotiations between the Purchasing Group and the Bank were taking place throughout this period, and continued over the same period that negotiations for renewal of the collective agreement were taking place. Packaging was continuing to lose money during this period, and its debts continued to mount, but this had been true for a considerable number of years, and as noted, had been known to the CAW since at least the early 90's. On the evidence, the logical inference is that the CAW was or should have been aware of the company's financial position at the time.

82. In all these circumstances, and given the paucity of evidence in this area, the Board does not find a violation of section 17 of the Act.

83. The applicant next submits that the manner in which the Records of Employment were filled out constitute breaches of the Act. The Records of Employment indicate that the employees had "Refused Offer of Employment" "See attached". The attachment is fully set out as paragraph 39 above.

84. The full commentary provided by Packaging was generally an accurate statement of the events. The statement at the end of it that the employees who rejected concessions were, in the circumstances, "rejecting the offer of employment" was merely stating the company's position, its subjective characterization of the events. There is nothing impermissible or unlawful in this. It is Employment Canada which will have to determine how to characterize the events, for purposes of entitlement to unemployment insurance benefits, and all that Packaging did was to provide its position on the point. Doing so is not a breach of the Act.

85. This brings us to the two remaining aspects of the complaint, whether the Side Agreement is in contravention of the Act and whether the closure of, or failure to re-open, the Petrolia plant, because the employees there would not agree to concessions, is an unlawful lock-out. We will deal with both of these aspects together. Both involve the propriety of the conduct of the new companies in linking concessions from the CAW employees to the continued closure or re-opening of the Petrolia facility.

86. As noted, the definition of lock-out in section 1(1) reads as follows:

"lock-out" includes the closing of a place of employment, a suspension of work or a refusal by an employer to continue to employ a number of employees, with a view to compel or induce the employees, or to aid another employer to compel or induce that employer's employees, to refrain from exercising any rights or privileges under this Act or to agree to provisions or changes in provisions respecting terms or conditions of employment or the rights, privileges or duties of the employer, an employers' organization, the trade union, or the employees.

87. In *Preston Springs Gardens Retirement Home*, [1984] OLRB Rep. Sept. 1241, the Board wrote as follows:

15. A “lock-out” is a form of economic sanction undertaken by an employer to modify his employees’ behaviour. It is a bargaining posture with both subjective and objective elements. In the first place, there must be a withholding of work opportunities: “a closing of a place of employment, a suspension of work or a refusal by an employer to continue to employ a number of his employees”. Secondly, (although often much more difficult to determine), there must be a subjective intention to compel or induce his employees (or some of them) to refrain from exercising rights or privileges which they enjoy under the *Labour Relations Act*, or to agree to changes in their terms and conditions of employment. Both elements must be present if the conduct in question is to be characterized, legally, as a “lock-out”.

16. The termination or lay-off of employees does not, in itself, constitute a lock-out even though the consequences for employees may be the same, nor is it sufficient that the employer was motivated by anti-union animus, if his intention was not to preserve the employment relationship of at least some of his employees on terms more favourable to himself. As the Board noted in *Doral Construction Limited* [1980] OLRB Rep. March 310, a mass termination of employees in favour of sub-contracting the work (there in response to a union organizing campaign) may be clearly illegal, yet still not constitute a “lock-out”. What is critical, is the *specific* motive behind the employer’s action, and, in particular, whether his intention is to preserve the relationship with his employees (or some of them) on different and more favourable terms. In the absence of such specific intent, the employer’s conduct is not a “lock-out” even though it may be an unfair labour practice or contrary to the terms of a collective agreement. That is why the Board has often held that a clear, final, unequivocal, and irrevocable decision to dispense with the services of some employees would not be a “lock-out” because the employer has no intention of preserving existing employment relationships on different terms or inducing employees to give up established rights. To reiterate: it may be an unfair labour practice, but it will not be an unlawful lock-out.

88. The applicant argues that both the objective element, the “closing of a place of employment, a suspension of work or a refusal by an employer to continue to employ a number of his employees”, and the subjective element, are obvious and self-evident. The responding parties have closed down the Petrolia facility entirely, and have repeatedly stated that it will remain closed unless employees agree to concessions to the current collective agreement. Because the responding parties are all bound to the collective agreement (by operation of law, given the Board’s findings above under sections 1(4) and 69 of the Act), any “lock-out” is untimely and therefore unlawful. The CAW submits this is the classic case of an employer bound to a collective agreement insisting in mid-term on concessions or the plant will be or will remain closed.

89. The employer argues that there has been no “lock-out”, lawful or otherwise. There has been no “closing of a place of employment, [nor] a suspension of work or a refusal by an employer to continue to employ a number of employees ...”. Containers is not refusing to employ the Petrolia workers. It is not the “employer” of those individuals, and never has been, it submits. These employees, argue the responding parties, were terminated by Packaging, before the sale, and in any event, were terminated by operation of law by the assignment in bankruptcy. Containers is not therefore refusing to “continue to employ” them, as it never did employ them. The necessary continuity of employment is lacking, in the submission of the responding parties.

90. There is no question on the facts that the Purchasing Group, both when it was prospective buyer, and now as new owner (through the vehicles of Containers and Ontario), is demanding concessions under the collective agreement or it will not open Petrolia. There is no question that the Purchasing Group is trying to induce the employees to agree to changes in the collective agreement and the continued closure of the facility is a powerful incentive to secure those concessions.

91. It is important to assess the events in context. This is not a typical lock-out scenario. We are dealing here with a sale of a business, where the prospective purchasers concluded that it was not economically viable to purchase the predecessor without concessions, because without them the business could not, in their view, be economically viable and they would be unable to continue the

business on an operating basis. Packaging was virtually insolvent and was not likely to have survived much longer without a sale, as the Bank continually emphasized. The Purchasing Group would not have bought Packaging, and its five facilities, without the concessions it received from the other three unions, which represented the employees at the four other company facilities. The Purchasing Group was unable to obtain these concessions from these other unions without a commitment that required it to obtain the same concessions from all the unions, including the CAW.

92. Even before the Purchasing Group was legally required to recognize or bargain with the unions, it commenced negotiations with them. It provided them with full access to its financial data. The other three unions were obviously satisfied that the company was in serious financial trouble and that it needed the concessions in order for the sale to close, in order for the plants or warehouses to continue operating, and in order for the employees they represented to retain their jobs. There was a legitimate economic necessity for the concessions.

93. The Board has encountered somewhat similar contexts in prior cases. In *Preston Springs*, (above), the Board wrote as follows:

17. The determination of the employer's intention, while critical in this legal context, can often be very difficult. In a volatile economic environment, occasions will inevitably arise when employers will be required to adjust their utilization of labour, alter hours of work, institute lay-offs, introduce job-destroying technological change, or even shut down part of their operation. Such decisions will necessarily have an adverse impact on employees, and will be of concern to their trade union; moreover, experience has shown that a candid discussion of these problems by labour and management can sometimes result in their resolution with attendant benefits to all concerned. Indeed, in *Consolidated Bathurst*, [1983] OLRB Rep. Sept. 1411, the Board suggested that responsible employers *should* seek to involve their employees' bargaining agent in this often painful and difficult decision-making process. Certainly, from a public policy point of view, it would be a curious result if an employer who refused to discuss these matters with a trade union were immune from criticism, while an employer who engages in a full and frank discussion of his economic problems, his options, and the potential employee impact were to find himself guilty of a threatened "lock-out". One would not lightly embrace an interpretation of a collective bargaining statute which so clearly encouraged unilateral decision-making and discouraged joint discussion of mutual problems. Should the "message" to employers be that they may face a lock-out allegation unless they act unilaterally, avoid consultation, adhere rigidly to their established course, and under no circumstances engage in discussion with the union which might be construed as "bargaining"? In *C.E. Lummus Canada Ltd.*, [1983] OLRB Rep. Oct. 1688, the Board observed:

11. The point raised is a difficult one. Given the definition of "lock-out", an employer who speaks during the term of a collective agreement of the need for concessions as a condition of further employment must be mindful of the basic structure of our *Labour Relations Act*. During the term of a collective agreement, an employer is not entitled to simply say, "I want a better deal, and I'm not going to continue to use your services, or part of your services, until I get it". That is prohibited as an untimely "lock-out", just as the opposite conduct on the part of employees and a trade union is prohibited as a "strike". On the other hand, an employer may, from time to time, find himself in a position where economic necessity has raised the spectre of management decisions which will significantly impact on the employment opportunities of his employees. In such circumstances it would seem to make labour relations sense to permit the employer to invite the bargaining agent to engage in meaningful discussion designed to avoid or minimize such impact, and indeed, this has been a main theme of the Board's "bargaining in bad faith" cases in recent times. Compare *Westinghouse Canada Limited*, [1980] OLRB Rep. April 577; *Sunnycrest Nursing Home*, [1982] OLRB Rep. Feb. 261; and *Consolidated Bathurst*, [1983] OLRB Rep. Sept. 1411. The Board's interpretation of the law ought not simply to deny the employees, through their trade union, (or employee bargaining agency, as the case may be) this opportunity for input in every case where the problem comes to a head during the term of the collective agreement itself. But, as noted, a fundamental prohibition exists against "lock-outs" or threatened "lock-outs" during the term of the collective agreement, just as it does for "strikes", and the Board must be

scrupulous in its analysis of each case, lest a plea of “economic circumstance” be used to mask an attempt simply to obtain better terms and conditions than have been agreed upon in the collective agreement. The Board recognizes that the issue of “economic necessity” can be a complex one, making a judgment on the employer’s true motivation difficult; but the Board cannot shy away from making such judgments, if employees through their bargaining agent are to be permitted an opportunity to exercise some degree of control over their economic lives, on the one hand, and the identification and control of unfair labour practices, engaged in under a cloak of “economic necessity”, is to be achieved on the other.

18. However, in our view, these questions of high principle or delicate balancing need not be debated here. The circumstances of the instant case provide a classic example of what is *not* a lock-out - whatever else it may be.

19. The evidence establishes, without doubt, that the employer’s enterprise was awash in a sea of economic troubles, which threatened its continuing viability. Operating losses were escalating - in large measure because of rising labour costs which even the union conceded were substantially “out of line” with those of competitors. Equivalent services could be purchased in the market for much less, and the employer decided to take that opportunity. There is no doubt whatsoever that this decision was based solely upon economics and was intended to be final and irrevocable, nor we might add were there any of the classic indicia of anti-union animus which prompted the Board to draw the distinction between an unlawful lock-out and other unfair labour practices. In any case, as Mr. McCormack saw it, the employer was seeking to “bury the bargaining unit”. It was not seeking concessions. Its discussions with the union were solely in accordance with Article 25 of the collective agreement.

20. There was no intention on the part of the employer or expectation on the part of the union that modification of the terms established in the collective agreement could stave off the proposed lay-off. The only contrary suggestion came from an official of the Ministry of Labour who, upon the request of the union, requested a “proposal” from the employer which might result in some modification of its decision. Even then, the employer’s response was that it had made its decision on economic grounds and that if it could realize equivalent cost savings in to her ways, there would be no reason to sub-contract the employees’ work. There was no “concession bargaining” on the employer’s part, and no intention to do so prior to the prompting of the Ministry of Labour official at the request of the trade union. In the circumstances the employer could not reasonably refuse to repeat what was obviously the case: so long as its labour costs were significantly above those payable to a sub-contractor, it was in its economic interest to sub-contract the work. We do not think that this interchange is sufficient ground for finding that there has been a threat of an unlawful lock-out; and, even if we were to find that the technical requirements for a “lock-out” have been met, we would be reluctant to grant relief for the allegedly culpable conduct on the employer’s part is merely an honest response to the union’s inquiry about what might be done to avoid the consequences of the course upon which the employer had embarked.

94. Finally, there is a recent decision of the British Columbia Labour Relations Board that is remarkably on point. In *Imperial Optical Company Limited*, BCLRB No. B148/94, Case No. 13483 (April 11, 1994), that Board wrote:

III. BACKGROUND

IOCO carried on business at a number of sites in Canada. One of these was in Burnaby. Employees in Burnaby were represented by the Union. IOCO and the Union were parties to a collective agreement with a term of August 1, 1991 to July 31, 1993. At least two other IOCO sites in Canada were unionized; however, most of IOCO’s operations were not unionized.

On December 14, 1992 CIBC exercised its rights under a security instrument provided to CIBC by IOCO. Pursuant to these rights, CIBC appointed PMT as the Receiver and Manager for the business of IOCO. CIBC also filed a court petition in Ontario seeking an order that IOCO was bankrupt. It was not disputed that as of December 14, 1992 IOCO was unable to meet its liabilities as they came due and was thus insolvent.

Also on December 14, 1992 PMT sent a letter to all employees of IOCO, including those at the Burnaby location. It stated:

We regret to inform you that as a result of the financial difficulties of Imperial Optical Company Ltd. ("IOCO"), IOCO is unable to fund its payroll requirements. Peat Marwick Thorne Inc. has been appointed Receiver and Manager (the "Receiver") by a secured creditor to take possession of and realize upon certain of the assets and property of IOCO. The Receiver will be meeting with your union representatives to discuss certain matters including your status with IOCO. Do not report to work after today until notified to do so by either your union or the Receiver.

PMT decided that the preferred method of disposition of IOCO was to sell it as a going concern. Consistent with this decision PMT obtained a line of credit that was available to fund the ongoing operation of IOCO. The line of credit was obtained on the basis of a business plan that included reduced terms and conditions of employment.

In a letter dated December 15, 1992 PMT confirmed with the Union that changes to the existing collective agreement were being sought. That letter stated:

Further to our recent telephone conversation, I enclose a proposed interim amending agreement in respect of the CAW Collective Agreement with Imperial Optical Company Ltd. ("IOCO"). Please note that this Agreement pertains to the Collective Agreements with United Headwear Optical and Allied Workers, Local 4 and will have to be amended to accord with the CAW; however the Agreement does reflect the position of Peat Marwick Thorne Inc. with respect to the CAW Collective Agreement. In addition, Paragraph 2 of this agreement will be amended, for the purpose of the exclusion, to include all health and welfare benefits provided for in the CAW Agreement.

As you are aware this is a matter of urgency. Please call me to discuss this matter later this afternoon at (416) 777-8857 or Heather Elson at (416) 777-8998.

Later on December 15, 1992 PMT sent the Union an interim amendment agreement, an employee acknowledgment and union release specific to the collective agreement between IOCO and the Union. The proposed terms of the interim agreement significantly altered the terms of the collective agreement. Article 14 of this proposed interim agreement stated that it would expire "...when all of the employees that have been recalled are no longer required and have been laid off but no later than six months from the date hereof...". Similar offers were made to the other unionized operations. At non-unionized sites, the terms and conditions of employment were varied unilaterally.

There was no production at the Burnaby plant after December 14, 1992. One of IOCO's area managers was rehired on December 16, 1992 to deal with work in progress. He returned completed work to customers; work not yet started was also returned to customers. Incomplete work remained on the site. Other branches of IOCO, including other unionized branches, did return to operation under the interim terms and conditions of employment. Some of them re-opened almost immediately.

Others re-opened after agreement was reached with the particular union. Eventually all the employees, both union and non-union, except those at the Burnaby location returned to work under the interim conditions of employment.

In Burnaby, there were a series of communications between PMT and the Union from December 14, 1992 onward regarding the proposed terms and conditions of employment. The Union did not accept the proposed interim agreement and on December 22, 1992 filed a grievance alleging violations of the collective agreement, including allegation of illegal lockout.

On December 23, 1992 the Ontario Court of Justice determined that IOCO was bankrupt and made a receiving order against IOCO. PMT was appointed the trustee of the estate. On March 18, 1993 IOCO was sold. The Burnaby site was not included in the sale and has never re-opened.

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V. ANALYSIS

(i) Unfair Labour Practice Allegation

The Union argues that PMT as a receiver and manager by instrument is an agent for IOCO and is liable in its own right for violations of the Code or collective agreement violations which occurred during the period that PMT was so acting. In addressing this issue the parties were in agreement that the appointment of a receiver and manager by instrument does not involve a disposition of the business; thus, a receiver and manager by instrument is not a successor employer under the Code. Likewise it was not in dispute that the appointment of a receiver and manager by instrument does not extinguish the collective agreement nor the rights and obligations under the Code. Finally, the Union agreed that if the Burnaby site had simply been closed on March 14, 1992 and no further activity had occurred then no violation of the Code would have had occurred. What is in dispute is whether the actions of PMT in seeking to obtain an interim agreement that would lead to a re-opening of the Burnaby site constitute violations of the Code for which PMT is liable in its own right.

The Union says that when PMT put forward the proposal for interim terms and conditions of employment as a necessary condition for re-opening the Burnaby site the employer engaged in an unfair labour practice.

I do not find the Union's argument persuasive. It was not disputed that IOCO was insolvent at the time of appointment of PMT. Nor was it suggested that the decision by PMT to try to dispose of the IOCO operations as ongoing businesses was improper or wrongful. In addition, it was not disputed that the line of credit necessary to maintain IOCO as an ongoing entity was obtained upon the understanding that modified terms and conditions of employment were to be applied. Finally, and significantly, the Union agreed that if it had made a proposal to PMT containing the same terms and conditions as that proposed by PMT to the Union, there would have been no violation of the Code.

The Union's position effectively means that PMT's error was to insist that it would not re-open without a change to the terms and conditions of employment. I fail to find a labour relations rationale that would support the Union's position. To demand that a receiver and manager not be allowed to pursue an initiative of this sort runs a very real risk of reducing or even eliminating the possibility of disposing of the business as an ongoing entity. As long as factors that would point to anti-union animus such as the bona fides of the insolvency, or the objectives of the proposal are not present the simple act of a receiver and manager putting forward a proposal to re-open conditional upon acceptance of modified terms and conditions of employment is not contrary to the Code.

The fact that IOCO operated multiple locations does not change the analysis. On the evidence the Burnaby location received no better or worse an option than did the other IOCO locations. Lacking evidence that the Burnaby site has been singled out for negative discriminatory consequences, I find no violation of the Code.

(ii) Illegal Lockout

I do not find that the evidence supports a finding of an illegal lockout. For reasons identical to those set out in the analysis with regard to the unfair labour practices, I find that the bona fides of the circumstances surrounding the insolvency and the subsequent behaviour of PMT are conclusive. The bona fide legal suspension from employment of the employees of IOCO is not converted into an illegal lockout simply because PMT did not return them to work following the Union's refusal to accept the interim terms and conditions of employment.

(iii) Did the Appointment of PMT as the Trustee in Bankruptcy make it a Successor Employer?

As previously stated, it was not disputed that PMT as a receiver and manager by instrument was an agent and not a successor. The question is whether the subsequently appointment of PMT as the trustee in bankruptcy had the effect of making PMT a successor employer. This issue has not been previously decided by the Board. The board has however determined that a court appointed receiver

and manager may be a successor employer: RASL Ventures Ltd. et al., BCLRB No. 209/87, (1988), 17 CLRB (NS) 1 ("RASL"). As stated by the Board:

... we have concluded that a court appointed receiver-manager can be found to be a successor employer. The appointment can properly be characterized as a transfer or other disposition within the meaning of Section 53 of the Labour Code. A court appointed receiver-manager obtains possession and control of the assets of the corporation and, to the extent it operates the business, it does so as a principal. Thereafter, there is an employment relationship between the receiver-manager and the employees of the business. (pp. 20-21)

The fact that a disposition occurs when a receiver and manager obtains possession or control by way of a court appointment is not definitive in determining that a successorship exists. It is only one of the necessary conditions. The second condition is that there be a "discernible continuity" of the business. The continued operation or re-opening of the business by the trustee in bankruptcy would provide such a discernible continuity.

The Union submits that an analogous policy be applied to a court appointment of a trustee in bankruptcy. Implicit in the Union's argument is the assertion that both of the necessary conditions have been met in this case. Assuming, without deciding, that the analogous test urged by the Union is appropriate, I am not convinced that the facts support the existence of both of the necessary conditions.

The Union does not dispute the fact that the Burnaby operation once closed on December 14, 1992 never returned to production. Consistent with this, the Union does not rely on the Burnaby operation to establish the necessary "discernible continuity". Rather, it says that it is the overall business of IOCO that must be considered and that it is the re-opening of the other IOCO sites by the Receiver and Manager that demonstrates the continuity of the business.

I do not agree that the "business" referred to in the words of the successor provisions of the code is the overall business of IOCO. The business, or part thereof, referred to in the successor provisions is a business subject to proceedings or rights under the Code. Rights under the Code attached to the Burnaby site. There was no evidence that rights under the Code attached to any other site. Thus, I conclude that the "business" at issue in this application is the business which operated at the Burnaby site.

As previously stated, it is not disputed that the Burnaby site never re-opened. Accordingly, I find that there is not a "discernible continuity" of the business. Lacking the necessary condition of a discernible continuity of the business, I find that there was not a successorship in relation to the appointment of PMT as the trustee in bankruptcy. The application must fail. Given this conclusion, it is not necessary to determine whether the second necessary condition was established on the facts. More specifically, it is not necessary to decide whether the court appointment of a trustee in bankruptcy constitutes a disposition of the business the same way it does when the court appoints a receiver and manager.

VI. CONCLUSION

The unfair labour practice, illegal lockout and successorship aspects of this application are dismissed.

95. There is no suggestion that the closure of the plant on the evening of May 14, 1997 was itself an unlawful lock-out (whether the manner of its closure breached the collective agreement is not in issue here), nor any suggestion that the Purchasing Group engaging in negotiations over concessions, prior to the sale, was unlawful in any respect. The company was able to obtain concessions from enough of the unions that it decided to close the deal, even absent those same concessions from the CAW, having unsuccessfully tried to obtain from the Bank permission to drop the Petrolia facility from the purchase. The deal was closed on the basis that the Purchasing Group was required to obtain concessions from the CAW or the plant in Petrolia was to remain closed. In effect, the Purchasing Group, Containers and Ontario, had made an irrevocable decision that the plant would not open without concessions. After

the sale, they continued to try to obtain concessions, continuing to tell the CAW and the members of the bargaining unit what they had been telling them since negotiations began: the facility would not open without concessions, and the assets at Petrolia would be liquidated.

96. Such conduct may amount to a technical “unlawful lock-out”, in that the new “employer”, by virtue of the declarations under sections 1(4) and 69 of the Act, is insisting on concessions before it will open the plant. If so, however, the unlawful activity lies not in the closure of the facility or in the refusal of the Purchasing Group or the new owners to re-open it, but in their continued attempts to try to obtain concessions as a condition of re-opening the plant. If any cease and desist remedy were to issue, it would logically require the responding parties to cease and desist from continuing with negotiations or any other conduct, interaction or communication with the CAW or its members that seeks to obtain concessions from them.

97. Apart from the considerable artificiality of such a remedy, which would permit and encourage bargaining over the issue of concessions prior to the sale, but would prohibit the continuation of these negotiations after the sale, it is a far more sensible result, from a labour relations perspective, that bargaining over the issue be allowed to continue. As the Board stated in *Lummus*:

In such circumstances, it would seem to make labour relations sense to permit the employer to invite the bargaining agent to engage in meaningful discussion designed to avoid or minimize such impact ...

It is highly unlikely that an order precluding further bargaining, during which time the plant remains closed, is an order even sought by the applicant, but in any event, to allow continued bargaining over these difficult issues at least enhances the possibility that the parties will be able to reach some accommodation that leads the employer to re-open the plant, and which preserves the jobs of the employees there. This is a far more sensible and preferable course of action than if the Board directed cessation of all discussion.

98. As the British Columbia Labour Relations Board said in *Imperial Optical*, “the union’s position effectively means that PMT’s error was to insist that it would not re-open without a change to the terms and conditions of employment. I fail to find a labour relations rationale that would support the union’s position.”.

99. We agree with these comments, and accordingly decline to issue any remedial relief with respect to the closure of the plant, the failure to re-open it, or the continued discussions with the CAW and/or its members over the need for concessions.

100. Since we have concluded that no relief will issue, and that the continued negotiations over the concessions are not to be proscribed, it follows that the Side Agreement was also not unlawful. In the circumstances here, the Purchasing Group was entitled to agree to liquidate the assets of Petrolia if it could not obtain the concessions it sought. Similarly, as with the lock-out” aspect of the application, there may be a technical breach of sections 70, 72 or 76 of the Act, but we would not, in the unique circumstances here, issue remedial relief. Again, this is not a typical “lock-out” or unfair labour practice scenario. Here, the Purchasing Group did not attempt to undermine the exclusive bargaining authority of the CAW. It recognized its representative rights before legally required to do so, and it dealt openly and honestly with the union throughout. The employer did not decide to close a plant to extract concessions, when it was not permissible to do so; rather, the prospective purchaser for *bona fide* economic reasons decided that concessions were needed, or closure, in order to effect the sale by which it first became bound to a bargaining relationship with the CAW. Had the facility at Petrolia not closed, given the decision of the bargaining unit there not to grant concessions, it is unlikely that the sale would

have taken place, and unlikely therefore that any employee would still be employed. This is not a course of conduct that justifies a finding that the Act has been breached.

101. For these reasons, the Board issued the decision it did on June 23, 1997.

0058-97-R West Parry Sound Health Centre, Applicant v. Canadian Union of Public Employees, Local 1473, Ontario Public Service Employees Union, Local 320 and Service Employees' Union, Local 478, Responding Parties

Hospital Labour Disputes Arbitration Act - Remedies - Sale of a Business - Parties agreeing that merger of hospitals constituting sale of a business, that the relevant bargaining units be merged, and that a representation vote between the incumbent unions be held to determine the new bargaining agent - Board ruling that collective agreement of winning union applies to all of the employees in the bargaining unit after a vote held under section 69(8) of the Act - Board determining that because all the bargaining units are covered by the statutory "freeze", the Board's declarations under section 69(4) of the Act should be made retroactive to the date of application

BEFORE: *Laura Trachuk*, Vice-Chair.

APPEARANCES: *Peter F. Chauvin* and *Alex O'Brien* for the applicant; *B. Sheehan*, *D. Broadbent*, *K. Heming* and *K. Atherton* for CUPE, Local 1473; *David Wright*, *Ed Ogibowski*, *Don Stewart*, *Jamie McAndie* and *Dollera Landy* for OPSEU, Local 320; *Sean Fitzpatrick*, *Suzanne Saville* and *Sandra Zylar* for Service Employees' Union, Local 478.

DECISION OF THE BOARD; August 22, 1997

1. This is an application under section 69 of the *Labour Relations Act, 1995*. At the outset of the hearing the parties advised the Board that they had agreed that a sale of a business occurred for the purposes of the Act when the Parry Sound District General Hospital and the Parry Sound Area Health Centre Chronic Care Facility merged on April 1, 1995 to become the West Parry Sound Health Centre. They also indicated that they had agreed that the bargaining units relevant to this application should be merged into two bargaining units, specifically, a clerical unit and a service unit. They have also agreed that a representation vote should be held between the Ontario Public Service Employees Unit, Local 320 (O.P.S.E.U.) and the Canadian Union of Public Employees, Local 1473 (C.U.P.E.) for the service unit and that a representation vote should be held between C.U.P.E. and the Service Employees' Union, Local 478 (S.E.U.) for the clerical unit. The parties further indicated that they are confident they can agree on bargaining unit descriptions and voters' lists prior to the votes taking place. However, the parties have identified one outstanding issue which is preventing them from proceeding to hold the votes. The parties have asked the Board to determine the issue of what collective agreement or terms and conditions of employment will govern the employees in the new bargaining units following the vote.

2. The parties agreed to present their arguments with respect to this issue on the basis of the facts set out in the application as follows:

SCHEDULE "A"

In support of its request, the Applicant relies on the following material facts:

1. Prior to April 1, 1995, both Parry Sound District General Hospital and Parry Sound Area Health Centre Chronic Care Facility, known as St. Joseph's Hospital ("St. Joseph's Hospital") existed as distinct Hospitals in the City of Parry Sound.

2. Prior to April 1, 1995, the following bargaining units existed at the Parry Sound District General Hospital. The number of employees currently in these bargaining units is inserted in brackets:

- (i) OPSEU - full-time (48) and part-time (144) support services
- (ii) SEU - full-time clerical (30)
- (iii) SEU - full-time (15) and part-time (5) paramedical
- (iv) CUOE - full-time and part-time operating engineers (1)
- (v) ONA - full-time nurses (34)
- (vi) ONA - part-time nurses (42)
- (vii) ONA - full-time (3) and part-time (26) nurses Home Care Program

3. Prior to April 1, 1995, the following bargaining units existed at St. Joseph's Hospital. The number of employees currently in these bargaining units is inserted in brackets:

- (i) CUPE - full-time (49) and part-time (57) clerical and support services
- (ii) ONA - full-time nurses (7)
- (iii) ONA - part-time nurses (12)

4. The two Hospitals decided to seek government approval for an amalgamation. The amalgamation was designed to enable the two institutions to improve patient care, rationalize services, maximizing their resources with resultant costs and efficiency savings. Guidelines for the rationalization of the two Hospitals were circulated.

5. The amalgamation between the Parry Sound District General Hospital and St. Joseph's Hospital was effective April 1, 1995. The amalgamated entity carries on business under the name of the West Parry Sound Health Centre (the Applicant).

6. Immediately following the amalgamation and for some time thereafter, the operations of the two predecessor Hospitals effectively continued at their separate sites, located approximately one kilometer apart in the City of Parry Sound. However, by virtue of the amalgamation, these two sites were under the common administration and governance of the Applicant.

7. The collective agreements that had been in effect prior to the amalgamation continued in effect, and were honored by the Applicant, subsequent to the amalgamation, with the result that the Applicant now had to administer ten separate collective agreements with five different unions.

8. On November 28, 1995, CUPE was certified to represent part-time clerical employees working at the former Parry Sound District General Hospital site. As noted above, the full-time clerical employees working at the former Parry Sound District General Hospital site had been represented by SEU since before the amalgamation.

9. As had been anticipated at the time of the amalgamation, the Applicant began to consolidate or rationalize some of its departments. The finance/accounting, human resources, health records, admitting/communications, laundry, rehabilitation, X-ray and laboratory departments were consolidated over the period April, 1995 to May, 1996. The kitchens and most of the Food Services Departments are to be consolidated to the former Parry Sound District General Hospital site by July, 1997. The ALC Programme is to be consolidated to the former St. Joseph's Hospital site by July, 1997.

10. This multiplicity of bargaining units had unduly fragmented the workplace resulting in increased grievances and additional administrative costs due to the fact that there were ten different collective agreements with ten different sets of terms and conditions of employment. In some instances, there are different and conflicting terms and conditions of employment which apply to persons working

side by side performing essentially the same work. For instance, both CUPE and OPSEU have separate collective agreements pertaining to support services. Both CUPE and SEU have collective agreements pertaining to office and clerical staff. Several employees work under two collective agreements and thus have different terms and conditions of employment and salaries depending upon which bargaining unit they happen to be working within at any given point in time, even though their job function and classification may be identical.

11. Intermingling has occurred as a result of the amalgamation of the two Hospitals, primarily arising from the consolidation of the departments discussed above and the certification of CUPE for part-time clerical employees at the former Parry Sound District General Hospital. Many of the Applicant's employees perform their duties alongside other employees of the same or similar classifications who are members of different unions and bargaining units. For example, many CUPE and SEU employees are intermingled in the accounting, admitting/communications, health records and laboratory departments and in the Home Care Programme. Many OPSEU and CUPE employees are intermingled in the dietary services, housekeeping and laundry services departments.

12. These difficulties arising from the undue fragmentation of the workplace and the intermingling of employees have not to date been resolved through bargaining between the parties. The Applicant has been successful in negotiating some solutions to some of these problems. For instance, on January 2, 1996, the Applicant signed a memorandum of agreement with the CUOE and OPSEU which affected the transfer of the CUOE's bargaining rights to OPSEU and the elimination of the CUOE bargaining unit. Second, on July 10, 1996, the Applicant and CUPE signed a memorandum of agreement which consolidated the new CUPE part-time clerical bargaining unit which was certified by the Board on November 28, 1995 with CUPE's existing full-time and part-time clerical and support services' collective agreement. Third, on April 22, 1996, the Applicant signed a memorandum of agreement with ONA consolidating the two full-time bargaining units and consolidating the two part-time bargaining units. The ONA Home Care bargaining unit remains a distinct third ONA bargaining unit. As a result, there will now be three rather than five ONA collective agreements. Fourth, on February 1, 1996, the Applicant signed a memorandum of agreement with SEU voluntarily recognizing the formerly non-union laboratory technologists working at the previous St. Joseph's Hospital site. This was done to resolve difficulties arising from the intermingling of union and non-union paramedical staff performing the same duties at the same location. Originally, paramedical employees at St. Joseph's Hospital were non-union. Paramedical employees at Parry Sound District General Hospital were represented by SEU. The laboratory department was consolidated following amalgamation, resulting in union and non-union paramedical employees all working together at the former Parry Sound District General Hospital site.

3. The parties also agreed to the submission of a chart comparing some of the terms, particularly monetary terms, of the collective agreements. That chart indicates that, on average, the wages in the last C.U.P.E. agreement are higher than those in the O.P.S.E.U. agreement. The last collective agreements between the parties were submitted to the Board.

4. The parties also agreed to the facts with respect to the status of their current collective agreements and negotiations. As is common in the hospital sector, all of the collective agreements have expired and the parties are involved in some stage of the negotiation and interest arbitration process under the *Hospital Labour Disputes Arbitrations Act* (HLDA). C.U.P.E. bargains centrally and has an interest arbitration award for a 1994-1995 collective agreement which has not yet been signed by the parties. Its last signed agreement expired on September 28, 1993. Its local appendix expired in September, 1995. C.U.P.E. has given notice to bargain for its post-1995 collective agreement. O.P.-S.E.U.'s most recent collective agreement expired in April, 1995. It has finished the interest arbitration process for a collective agreement which expired in April, 1997, but an award has not yet been issued for that agreement. S.E.U.'s last collective agreement also expired in April 1995. It has commenced interest arbitration for its 1995-1997 collective agreement but that process has not been completed. That collective agreement will also have expired in April, 1997. Therefore, all of the parties are covered by the statutory "freeze" found at section 13 of the HLDA.

5. The parties also agreed that the hospital could make three points for the purposes of the hearing with which the unions would neither agree nor disagree as follows:

1. One of the reasons for the amalgamation was to attempt to achieve some cost and efficiency savings.
2. According to the hospital's Operating Plan [which was approved by the Ministry in June, 1997], its excess revenues are less than \$1,000.00 at the current wages. The hospital described this as a "break-even" budget.
3. If, as a result of the reorganization of the bargaining agents and collective agreements, there is an immediate increase in costs to the hospital it will put the hospital in an unforecast deficit position.

6. The parties also indicated that they had all agreed that seniority would be dovetailed regardless of the outcome of the votes.

7. The parties have also agreed that the S.E.U. paramedical unit will cover all paramedical employees at the merged hospital and the Board was asked to confirm that agreement in its order.

Labour Relations Act, 1995

Relevant Statutory Provisions

69. (1) In this section,

"business" includes a part or parts thereof; ("entreprise")

"sells" includes leases, transfers and any other manner of disposition, and "sold" and "sale" have corresponding meanings. ("vend", "vendu", "vente")

(2) Where an employer who is bound by or is a party to a collective agreement with a trade union or council of trade unions sells his, her or its business, the person to whom the business has been sold is, until the Board otherwise declares, bound by the collective agreement as if the person had been a party thereto and, where an employer sells his, her or its business while an application for certification or termination of bargaining rights to which the employer is a party is before the Board, the person to whom the business has been sold is, until the Board otherwise declares, the employer for the purposes of the application as if the person were named as the employer in the application.

(3) Where an employer on behalf of whose employees a trade union or council of trade unions, as the case may be, has been certified as bargaining agent or has given or is entitled to give notice under section 16 or 59, sells his, her or its business, the trade union, or council of trade unions continues, until the Board otherwise declares, to be the bargaining agent for the employees of the person to whom the business was sold in the like bargaining unit in that business, and the trade union or council of trade unions is entitled to give to the person to whom the business was sold a written notice of its desire to bargain with a view to making a collective agreement or the renewal, with or without modifications, of the agreement then in operation and such notice has the same effect as a notice under section 16 or 59, as the case requires.

(4) Where a business was sold to a person and a trade union or council of trade unions was the bargaining agent of any of the employees in such business or a trade union or council of trade unions is the bargaining agent of the employees in any business carried on by the person to whom the business was sold, and,

- (a) any question arises as to what constitutes the like bargaining unit referred to in subsection (3); or
- (b) any person, trade union or council of trade unions claims that, by virtue of the

operation of subsection (2) or (3), a conflict exists between the bargaining rights of the trade union or council of trade unions that represented the employees of the predecessor employer and the trade union or council of trade unions that represents the employees of the person to whom the business was sold,

the Board may, upon the application of any person, trade union or council of trade unions concerned,

- (c) define the composition of the like bargaining unit referred to in subsection (3) with such modification, if any, as the Board considers necessary; and
- (d) amend, to such extent as the Board considers necessary, any bargaining unit in any certificate issued to any trade union or any bargaining unit defined in any collective agreement.

(5) The Board may, upon the application of any person, trade union or council of trade unions concerned, made within 60 days after the successor employer referred to in subsection (2) becomes bound by the collective agreement, or within 60 days after the trade union or council of trade unions has given a notice under subsection (3), terminate the bargaining rights of the trade union or council of trade unions bound by the collective agreement or that has given notice, as the case may be, if, in the opinion of the Board, the person to whom the business was sold has changed its character so that it is substantially different from the business of the predecessor employer.

(6) Despite subsections (2) and (3), where a business was sold to person who carries on one or more other businesses and a trade union or council of trade unions is the bargaining agent of the employees in any of the businesses and the person intermingles the employees of one of the businesses with those of another of the businesses, the Board may, upon the application of any person, trade union or council of trade unions concerned,

- (a) declare that the person to whom the business was sold is no longer bound by the collective agreement referred to in subsection (2);
- (b) determine whether the employees concerned constitute one or more appropriate bargaining units;
- (c) declare which trade union, trade unions or council of trade unions, if any, shall be the bargaining agent or agents for the employees in the unit or units; and
- (d) amend, to such extent as the Board considers necessary, any certificate issued to any trade union or council of trade unions or any bargaining unit defined in any collective agreement.

(7) Where a trade union or council of trade unions is declared to be the bargaining agent under subsection (6) and it is not already bound by a collective agreement with the successor employer with respect to the employees for whom it is declared to be the bargaining agent, it is entitled to give to the employer a written notice of its desire to bargain with a view to making a collective agreement, and the notice has the same effect as a notice under section 14.

(8) Before disposing of any application under this section, the Board may make such inquiry, may require the production of such evidence and the doing of such things, or may hold such representation votes, as it considers appropriate.

(9) Where an application is made under this section, an employer is not required, despite the fact that a notice has been given by a trade union or council of trade unions, to bargain with that trade union or council of trade unions concerning the employees to whom the application relates until the Board has disposed of the application and has declared which trade union or council of trade unions, if any, has the right to bargain with the employer on behalf of the employees concerned in the application.

(10) For the purposes of sections 7, 63, 65, 67 and 132, a notice given by a trade union or council of trade unions under subsection (3) or a declaration made by the Board under subsection (6) has the same effect as a certification under section 10.

(11) Where one or more municipalities as defined in the *Municipal Affairs Act* are erected into another municipality, or two or more such municipalities are amalgamated, united or otherwise joined together, or all or part of one such municipality is annexed, attached or added to another such municipality, the employees of the municipalities concerned shall be deemed to have been intermingled, and,

- (a) the Board may exercise the like powers as it may exercise under subsections (6) and (8) with respect to the sale of a business under this section;
- (b) the new or enlarged municipality has the like rights and obligations as a person to whom a business is sold under this section and who intermingles the employees of two of the person's businesses; and
- (c) any trade union or council of trade unions concerned has the like rights and obligations as it would have in the case of the intermingling of employees in two or more businesses under this section.

(12) Where, on any application under this section or in any other proceeding before the Board, a question arises as to whether a business has been sold by one employer to another, the Board shall determine the question and its decision is final and conclusive for the purposes of this Act.

(13) Where, on an application under this section, a trade union alleges that the sale of a business has occurred, the respondents to the application shall adduce at the hearing all facts within their knowledge that are material to the allegation.

Hospital Labour Disputes Arbitration Act

Working conditions may not be altered

Sec. 13. Despite subsection 81(1) [now 86(1)] of the *Labour Relations Act*, where notice has been given under section 14 [now 16] or 54 [now 59] of that Act by or to a trade union that is the bargaining agent for a bargaining unit of hospital employees to which this Act applies to or by the employer of such employees and no collective agreement is in operation, no such employer shall, except with the consent of the trade union, alter the rates of wages or any other term or condition of employment or any right, privilege or duty of the employer, the trade union or the employees, and no such trade union shall, except with the consent of the employer, alter any term or condition of employment or any right, privilege or duty of the employer, the trade union or the employees, until the right of the trade union to represent the employees has been terminated.

Submissions of the Parties

8. The hospital commences its argument by referring to the differences in the various unions' collective agreement provisions. Some of the differences pertain to wage rates but there are also some classifications which exist in one bargaining unit but do not exist in others. In such cases the hospital suggests that whichever union wins the vote will have to commence negotiation for those positions. The hospital argues that this indicates that the Act contemplates that after a representation vote under section 69 the "*status quo*" is to be maintained (meaning that employees continue to be covered by the terms of the collective agreement which covered them before the vote) and that the winning union has the option of giving the employer notice to bargain. If the winning union does give notice to bargain the statutory freeze is triggered and the *status quo* is therefore maintained until bargaining is completed. The hospital notes that almost half of O.P.S.E.U.'s bargaining unit is classified as "home support worker" which is a classification which does not exist in the C.U.P.E. agreement. Therefore, if C.U.P.E.

wins the vote, not only will there not be a wage rate in its collective agreement for these individuals, but the specific provisions in the O.P.S.E.U. agreement which accommodate the fact that they work unusual hours outside the hospital will also not be reflected.

9. The hospital then turns to an analysis of section 69 of the Act. It suggests that section 69(2) does not apply to this case but does apply in situations where there is no intermingling. In such circumstances the collective agreement “flows through” as C.U.P.E. and S.E.U. assert it does in this case. The hospital asserts that it is section 69(6) which applies to the facts of this case. The hospital notes that subsection (c) gives the Board the power to declare which bargaining agent holds bargaining rights but not to declare that a collective agreement applies to all of the employees. According to the hospital this section is read in reference to section 69(8) which gives the Board the power to order a vote but the purpose of that vote is not to determine which collective agreement applies but which bargaining agent will represent the employees. The hospital suggests that if the winning union’s collective agreement is to apply to all employees after the vote then unions could campaign on the basis of which collective agreement is preferable. In the hospital’s view that is not appropriate because employees should be voting on the basis of which union “best represents their interests”. The best interpretation, according to the hospital, is that the winning union inherits both collective agreements and then reconciles them through negotiation. This result shelters the hospital from an unforecast expense. The present budget is based on the *status quo* with the expectation that there will be an opportunity to negotiate the size of any deficit resulting from wage and benefit increases. If the winning union’s collective agreement applies to everyone and includes wage and salary increases there will be an automatic unforecast deficit. The hospital contends that the power in section 69(d) to amend a bargaining unit description as necessary does not mean that the Board can extend the winning union’s collective agreement over the entire bargaining unit after the vote.

10. The hospital submits that section 69(7) also directly applies to this situation. Under this section the winning union commences bargaining with the employer after the vote for the collective agreement. The collective agreement does not flow through as it would under section 69(2) as the sale was in 1995 and the unions have not claimed bargaining rights for the other bargaining units since that time. The purpose of section 69 of the Act is to preserve and not to expand a union’s bargaining rights and an interpretation of the section which would extend the winning union’s collective agreement across the whole of the new bargaining unit would not be consistent with that principle. It notes that the Act does not say that the winning union’s collective agreement is extended to cover all of the employees formerly represented by both unions. According to the employer, the winning union becomes a party to two collective agreements and the Board’s power to amend the recognition clause of a collective agreement is included to permit that to happen. The employees therefore have two different collective agreements and two bargaining units but the same union is a party to both. In the alternative, the employer suggests that the different terms and conditions of employment could be included in the same collective agreement. If the winning union then wants to consolidate the two collective agreements or the different terms, and the agreements have not expired, it may give notice to bargain under section 69(7). The statutory freeze then applies to maintain those terms and conditions of employment until a new collective agreement is negotiated.

11. The hospital refers to the following decisions of the Board: *The Bryant Press Limited*, [1972] OLRB Rep. April 301; *Kitchener Waterloo Hospital*, [1993] OLRB Rep. March 187; *Caressant Care Nursing Home of Canada Limited*, [1984] OLRB Rep. August 1060.

12. O.P.S.E.U. supports the result urged upon the Board by the hospital but suggests that a different analysis of section 69 would lead there. O.P.S.E.U. submits that the terms and conditions of both collective agreements would be “frozen” after a vote in these circumstances because of the effect of section 69(7) and the fact that the parties are all in the “statutory freeze” period in any case.

O.P.S.E.U. notes that section 69(7) is the only subsection that deals with what is to occur after a declaration under section 69(6). After such a declaration the union represents people it did not represent previously and section 69(7) therefore gives the union the power to give notice to bargain with the same "statutory freeze" result as notice under section 16 (all of the parties agreed that the reference to notice under section 14 in the Act is an error). O.P.S.E.U. denies that section 69(7) is intended to apply where there is no collective agreement because section 69(3) already deals with that situation. According to O.P.S.E.U. the Act mandates that after a union has been declared the bargaining agent after a vote it can give notice to bargain but it cannot insist on its collective agreement continuing and covering the entire new bargaining unit.

13. O.P.S.E.U. acknowledges that, on its analysis, there would continue to essentially be two collective agreements in place after the vote. However, it submitted that this was acceptable for a period of time in order to provide the opportunity to employees to have a say in what the terms and conditions of employment contained in their collective agreement will be. If the winning union's agreement is imposed after the vote, the employees who were not in that bargaining unit at the time of its negotiation have had no opportunity to participate in that bargaining process. O.P.S.E.U. suggests that the Board's power under section 69(6)(a) to declare that a collective agreement no longer binds an employer can be exercised at any time so the Board could delay making such a declaration until a new agreement was negotiated. O.P.S.E.U. acknowledges that the losing union whose agreement remained in effect would no longer be a party to it.

14. In the alternative, O.P.S.E.U. argues that the circumstances of this case fall within section 69(3) of the Act. None of the parties have an existing collective agreement which they can claim should continue and all are covered by section 13 of the HLDA. They are all operating under frozen terms and conditions in any case. Therefore all of the unions are in bargaining under section 69(3) of the Act and section 69(7) puts them in bargaining for the newly added part of the unit after the vote. To find otherwise would be to allow a union to require an employer to change the terms and conditions of employment for the newly added members of the bargaining unit during the freeze.

15. O.P.S.E.U. suggests that there are good policy reasons to accept its interpretation of the Act on the facts of this case. Over 50% of O.P.S.E.U.'s bargaining unit are home care workers or ambulance drivers which are classifications not covered by C.U.P.E.'s collective agreement. There are very specific provisions in O.P.S.E.U.'s agreement to reflect the unusual working conditions of these classifications. The employees affected by them have had the opportunity to have input into these terms. If C.U.P.E. wins the vote it will not be possible to negotiate special provisions for these classifications until negotiations/arbitration for the 1997-1999 agreement. O.P.S.E.U. suggests that it will not be possible to include them in the 1995-1997 agreement as they were not in the C.U.P.E. bargaining unit during those years. O.P.S.E.U. notes that its agreement has much more expansive long term disability rights than C.U.P.E.'s. It suggests that employees should be involved in the renegotiation of those if they are to change. Given the relative percentages of members in the combined bargaining unit, if C.U.P.E. wins the vote the terms and conditions of employment will have been determined by approximately 30% of the employees.

16. O.P.S.E.U. refers to a decision of the Board in File Nos. 0269-96-R, 0270-96-R, 0271-96-R, 0272-96-R (June 19, 1996) which incorporated Minutes of Settlement between other locals of these union parties in which they agreed to a process similar to the one O.P.S.E.U. claims is mandated by the Act.

17. S.E.U. submits that the correct interpretation of section 69 is that the collective agreement of the successful union covers all of the employees in the new bargaining unit after a vote. The S.E.U. suggests that this interpretation is consistent with the Board's jurisprudence and with good labour

relations. Section 69(6) is the subsection which deals with a conflict between two unions. The subsection outlines the Board's powers to deal with a situation such as this one. Those powers are precise. The Board has the power to make declarations under section (a) and (c). Subsections (b) and (d) are the Board's powers to determine how many bargaining agents there should be and how they should be described. According to the S.E.U. these parties have agreed upon the matters that fall under (b) and (d) and have agreed that the winner of the vote will become the bargaining agent. The issue before the Board, therefore, turns on section 69(6)(a). The Board should use that section to declare that the hospital is no longer bound by the losing union's collective agreement. The Board should then use subsection (d) to amend the bargaining unit description in the collective agreement of the successful union to the extent necessary so that it reflects the new bargaining unit that the parties have agreed to.

18. S.E.U. rejects the suggestion that the Board should not use its power to declare the losing union's collective agreement not binding upon the employer until some future date. It also denies that section 69(3) applies to this situation. Furthermore, the S.E.U. claims that the Act does not empower the Board to order the parties into negotiation for a collective agreement. According to the S.E.U., section 69(7) only empowers the union to give notice to bargain. It also denies that this section applies to a situation such as this between two unions with collective agreements who are subject to a vote. S.E.U. submits that subsection (7) is limited to a situation where a union has been issued a certificate and has given notice to bargain but does not yet have a collective agreement. That is why it only refers to notice under section 14 of the Act (which is assumed by all to mean section 16) and does not refer to notice under section 59. S.E.U. denies that the section can be used by the winning union to give notice to bargain for those parts of the new bargaining unit that do not "fit" under its collective agreement. It notes that there are a number of problems with any other interpretation. For example, who would such notice to bargain refer to, as there would be only one bargaining unit of employees? It would also mean that the employees in the same bargaining unit would be covered by different terms and conditions of employment and their "agreements" would be on different timetables. According to the S.E.U., this is a bad labour relations result and is not consistent with the Board's previous jurisprudence. S.E.U. asserts that such discrepancies are to be dealt with under the terms of the winning union's collective agreement or through negotiations in the normal course. It argues that the implication of the hospital's and O.P.S.E.U.'s proposed interpretations of the Act is that the *winning* union's collective agreement will have to be terminated at some point. The Board has indicated that it would only be willing to do that in the most extraordinary circumstances. Such an interpretation is not consistent with the 1970 amendments to the Act referred to in the Board's decision in *Bermay Corporation Limited*, [1980] OLRB Rep. Feb. 166. It is also not consistent with the proposals in Bill 136, legislation currently before the legislature, which specifically gives a different tribunal the power to do what O.P.S.E.U. and the hospital claim can be inferred from section 69.

19. The S.E.U. denies that the Board should be concerned that employees will be covered by a collective agreement into which they have had no input as they will have the opportunity to vote. That is why it is appropriate to determine what effect the vote will have in advance of holding it. It also denies that the Board should consider the cost to the hospital. It notes that it is the hospital's application and if it set its budget without considering the possible effect of the application it is just bad planning. It was the hospital's decision to amalgamate the two hospitals in the first place and this must have been considered a potential cost. The hospital's cost considerations should be weighed against the labour relations principles of putting the labour relations regime on a firm footing. Overall, the problems caused by either the hospital's or O.P.S.E.U.'s proposals would be so significant that the S.E.U. position should be preferred.

20. S.E.U. denies that this situation is governed by section 69(3) as proposed by O.P.S.E.U. It also denies that the fact that all of the collective agreements have expired and that the parties are covered by a statutory "freeze" should be a significant concern to the Board. In response to a question

from the Board as to what it would be amending under section 69(6) counsel suggested that the Board would amend the scope clause in the “frozen” collective agreement.

21. S.E.U. denies that most of the cases referred to by the hospital and O.P.S.E.U. apply to this situation as they do not deal with what happens with respect to collective agreements after a vote. It refers the Board to *Caressant Care Nursing Home of Canada Limited*, [1985] OLRB Rep. March 382 and *Bermay Corporation Limited*, *supra*.

22. C.U.P.E. commences its argument by pointing out that the application was initiated by the hospital to resolve the mischief that it now wants to continue with its proposal i.e. the problem of operating with various collective bargaining regimes. It submits that the hospital’s proposal requires the winning union to administer two collective agreements, one of which it never negotiated, until both are up for renewal and new negotiations completed. In this case that might be four to five years hence. This is inconsistent with the whole intent of section 69(6) which is to end up with one bargaining unit. C.U.P.E. then outlines some of the conflicting provisions which would be “frozen” and therefore apply to the employees in the same bargaining unit if the hospital’s or O.P.S.E.U.’s proposals are accepted.

23. C.U.P.E. denies that the Board has the statutory authority to do what O.P.S.E.U. and the hospital are asking it to do. Section 69(6)(a)-(d) taken together give the Board the power only to declare that the winning union’s collective agreement applies after a representation vote. The Board can declare a collective agreement to be null and void under section 69(6)(a) but it cannot declare that the collective agreement provisions remain in force. If that was the legislature’s intention it would have been clear. It claims that this interpretation flows from this situation in which the parties have agreed to a bargaining unit description. The collective agreement is therefore amended and a representation vote is held. The Board does not need to amend the recognition clause. The Act does not require a trade union to give notice to bargain. Section 69(7) deals with a situation in which a union is negotiating a first collective agreement. Under the hospital’s and O.P.S.E.U.’s proposals a winning union would be worse off after a sale because section 59 notice gives greater protection than section 16 notice and section 69(7) only refers to section 16 notice. Section 69(7) treats the union as a new bargaining agent. The difference between section 69(3) and (7) is that section 69(3) refers to notice under section 59 or 16, whereas (7) only refers to section 14 (section 16) indicating that it applies to a first contract situation. C.U.P.E. also notes that the legislation prior to the 1995 amendments gave the Board the express power to deal with seniority which has been removed. It cannot therefore be said that such powers to amend collective agreements are “inherent” in the Act or the section.

24. C.U.P.E. agrees with the S.E.U. that the decisions referred to by the hospital are distinguishable as they do not deal with the issue of what happens in a two union situation after a vote. It does rely upon the Board’s decision in *Kitchener Waterloo Hospital*, *supra*, however, for the principle that the declaration should be made as of the date of the sale not the date of the application.

25. C.U.P.E. argues that the Board should not be concerned if, as a result of the vote, a collective agreement is applied to all of the employees even though a relatively small percentage had input into its negotiation because all of the employees will have the opportunity to vote. It is appropriate that part of the decision in deciding who to vote for would be based on what each union has been able to achieve. In this case the people voting will know exactly what their terms and conditions of employment will be depending on who wins the vote so it cannot be said that they do not have the democratic right to choose their terms and conditions of employment. C.U.P.E. also denies that the Board should be concerned that if it wins the vote its collective agreement does not have provisions which deal with some of the employees. It asserts that the parties will sort out those problems as they always do and as *Bermay*, *supra* and the decision of the Board in *Ronnie Gee’s Sports Palace*, [1991] OLRB Rep. May 689 anticipates that they will. It points out the problems inherent in an interpretation of section 69(7)

which would result in the winning union giving notice to bargain for part of the bargaining unit. For example: Would a party apply for conciliation for part of the unit? Would there be two separate applications for arbitration under the HLDAA? In C.U.P.E.'s case the problems are compounded by the fact that it participates in central bargaining. It cannot give notice to bargain for any part of its bargaining unit outside of that process.

26. C.U.P.E. also denies that this is a case which should be considered in terms of the statutory freeze.

27. In reply O.P.S.E.U. notes, among other things, that the statutory freeze under the HLDAA does not freeze the collective agreement but the terms of the collective agreement. Therefore there is nothing in existence to amend under section 69(6) and the parties are simply negotiating in the statutory freeze while the terms and conditions of employment that existed before the vote continue to be frozen. It denies that Bill 136 has any bearing on this situation and notes that if the reference in section 69(7) to section 14 is an error when the omission of section 59 could also be an error. If section 69(7) deals only with "first contract" situations it is redundant as section 69(3) already does that. Without section 69(7) there is nothing that requires an employer to negotiate with the winning union with respect to making the collective agreement appropriate to the new bargaining unit.

28. The hospital replies that the best interpretation and result is that after the vote the winning union is a party to both collective agreements and it can seek to have them merged into one through negotiations with the employer if it chooses. It submits that *Bermay* is distinguishable as it deals with a union/non-union situation which was treated by the Board as an "accretion".

Decision

29. The issue that the parties have agreed to place before the Board can be broken down into two questions.

- a) Does the collective agreement of the winning union apply to all of the employees in the bargaining unit after a representation vote held pursuant to section 69(8) of the Act?
- b) What, if any, impact does the fact that the parties are in a statutory freeze period have on the answer to question (a).

Does the collective agreement of the winning union apply to all of the employees in the bargaining unit after a representation vote held pursuant to section 69(8) of the Act?

30. After carefully considering the submissions of the parties the Board finds that the interpretation proposed by S.E.U. and C.U.P.E. is the only one supported by the legislative provisions. Section 69 provides the Board with limited tools to deal with the fall-out of a representation vote between two trade unions in a sale of a business situation. The limited nature of these tools, however, has not been the source of significant labour relations difficulties since it does not appear that the Board has been asked to determine this specific issue in the past. In the vast majority of cases, the parties have been able to agree on a post-vote strategy that makes labour relations sense to them. In this case, however, the parties were unable to reach such an agreement and the limited nature of the Board's tools has become obvious.

31. Section 69(6) is the subsection which refers to intermingling and it is therefore in that subsection that the Board's powers in this situation are found. Taken together, they allow the Board to do the following. Prior to the vote the Board can make a determination under section 69(b) that the

employees constitute one or more appropriate bargaining units. It can then order a vote of those employees under section 69(8). After the vote it can declare which trade union shall be the bargaining agent of the employees in the unit under subsection (c). That is as far as the Board has generally gone in such cases. Here the Board has been asked to go further and it finds that subsequent to the vote it has the power to declare that the hospital is no longer bound by the collective agreement of the losing trade union under section 69(a). It can then, under subsection (d), amend the bargaining unit description in the winning union's collective agreement to reflect the proper employer and the parameters of the bargaining unit found to be appropriate by the Board under subsection (b).

32. It might be possible to interpret the sections as permitting the Board to terminate both collective agreements after a vote or to amend the bargaining unit descriptions of both collective agreements to make the winning union a party to both. However, the lack of any other supportive provisions makes such an interpretation untenable. In either case the Board would also need the power to direct the parties to enter collective bargaining and to order the contents of the new or consolidated collective agreement if the parties are unable to agree. The suggestion that the winning union should be a party to, and therefore responsible for administering, both collective agreements is simply unreasonable. It would be responsible for administering conflicting provisions arising out of a collective agreement it had never negotiated.

33. The result of having the winning union's collective agreement apply to all of the employees in the bargaining unit with no requirement to negotiate at all may not make labour relations sense in many situations and this may indeed be one of them. On the other hand, continuing two conflicting labour relations regimes which have given rise to the need for Board intervention in the first place does not make good labour relations sense either. A "winner take all" approach as described by the hospital has the benefit of a certain outcome for all of the parties and for at least those employees in classifications found in both collective agreements.

34. The hospital urges the Board not to interpret the Act so as to extend the winning union's collective agreement over the entire bargaining unit because of the unforeseen costs if the union with the higher wage rates wins. However, the potential for increased wage costs can hardly be unforeseen when two businesses are merged and one pays higher wages. It could certainly be foreseen as a potential outcome when the hospital filed this application. The hospital's wage increases are always unknowable to some degree due to the interest arbitration process. Furthermore, there is nothing to stop a winning union and any employer from meeting to negotiate the ramifications of such increased wage costs. Indeed, they may be wise to do so. However, there is nothing in section 69 which empowers the Board to require the parties to meet for the purpose of such negotiations.

35. This interpretation is also most consistent with the few comments that the Board has made on this issue in the past. The closest the Board has come to making a determination on point is in the *Bermay* decision, *supra*. Although that case did not deal with a situation in which the members of two unionized bargaining units were intermingled, the Board makes it clear what the outcome would be after the vote in such a case. It should be noted that to the extent that doubt has been cast upon the Board's findings in *Bermay* it is not with respect to what it has to say about what should occur after a vote in such circumstances. The Board stated as follows:

14. The employer submits that both the effect of section 55 and the intention of the Board's order is that the vote should determine only whether the union should be entitled to bargain on behalf of the employees. The respondent's position in this regard proceeds from a view of the operation of section 55 which is difficult to reconcile with the history of the Act.

15. There was a time when section 55 used to operate in the way the respondent says it should in this case. The first legislation imposing a duty on a successor employer when he purchased a business where a collective agreement was in effect was *The Labour Relations Amendment Act*,

1962-63, S.O. 1962-63, c. 70, section 1, which introduced what was then section 47a(2), into the Act:

“Where an employer who is bound by or is a party to a collective agreement with a trade union or on behalf of whose employees a trade union has been certified as bargaining agent or has given or is entitled to give notice under section 11 or 40 [now 13 or 45] sells his business, the trade union continues, until the Board otherwise directs, to be the bargaining agent for the employees of the person to whom the business was sold in the like bargaining unit in that business, and the trade union is entitled to give to the person to whom the business was sold a written notice of its desire to bargain with a view to making a collective agreement, and such notice has the same effect as a notice under section 11.”

16. That legislation kept the collective agreement and a union's bargaining rights distinct. What survived the sale of a business was the union's right to bargain on behalf of the employees in a bargaining unit like the unit described in the prior collective agreement or in an outstanding certificate. In other words, the union found itself in the same position as a newly certified union. The result was that the employees were then subject to having their terms and conditions of employment negotiated anew. The employees were not protected by the operation of what was then section 59 (now section 70), from changes in their terms and conditions of employment until the union gave the new employer notice of its desire to bargain. The collective agreement ended and the continued entitlement of the employees to have their contracts of employment unchanged depended on how quickly their union gave its notice to bargain. In the result, there was considerable insecurity surrounding the rights of employees as to their terms and conditions of employment if the business was sold to a new employer. And most importantly, the sale of the business effectively terminated the collective agreement.

17. That was radically changed by an amendment of the section seven years later. *The Labour Relations Amendment Act, 1970* (No. 2), S.O. 1970, c. 85, section 22 replaced the above section with what is now section 55(2):

“Where an employer who is bound by or is a party to a collective agreement with a trade union or council of trade unions sells his business, the person to whom the business has been sold is, until the Board otherwise declares, bound by the collective agreement as if he had been a party thereto and, where an employer sells his business while an application for certification or termination of bargaining rights to which he is a party is before the Board, the person to whom the business has been sold is, until the Board otherwise declares, the employer for the purposes of the application as if he were named as the employer in the application.”

18. The section as it now stands stabilizes the *status quo* from the moment of the sale and gives more security to employees and their union. Under the present provisions of section 55, the first question is whether the sale of business has occurred. A determination by the Board that a sale or transfer has occurred within the meaning of section 55 of the Act means that the collective agreement continues in force without interruption, binding the new employer just as it did his predecessor. There is no hiatus in the operation of the collective agreement and no room for the unilateral imposition of changes. The successor employer is obliged to observe the terms of the agreement in relation to all of the employees who come under it until the Board otherwise declares.

19. A necessary adjunct to the preservation of collective agreements or bargaining rights, as the case may be, after the sale of a business is the ability to sort out competing interests where two or more collective agreements or two or more sets of bargaining rights appear to conflict. No less important is the ability to make adjustments when, as in this case, “non-union” employees of a successor employer are intermingled under a collective agreement handed down from a predecessor employer. To deal with that problem section 55(6) of the Act provides:

“Notwithstanding subsections 2 and 3, where a business was sold to a person who carries on one or more other businesses and a trade union or council of trade unions is the bargaining agent of the employees in any of the business [sic] and such person intermingles the employees of one of the businesses with those of another of the businesses, the

Board may, upon the application of any person, trade union, or council of trade unions concerned,

- (a) declare that the person to whom the business was sold is no longer bound by the collective agreement referred to in subsection 2;
- (b) determine whether the employees [sic] concerned constitute one or more appropriate bargaining units;
- (c) declare which trade union, trade unions or council of trade unions, if any, shall be the bargaining agent or agents for the employees in such unit or units; and
- (d) amend, to such extent as the Board considers necessary, any certificate issued to any trade union or council of trade unions or any bargaining unit defined in any collective agreement.”

Section 55(6)(a) of the Act was enacted at the same time as section 55(2). It gives the Board a discretion to deal with the realities of each particular situation where intermingling occurs. It clearly does not provide that the Board *shall* terminate the collective agreement any time there is intermingling of employees after the sale of a business.

20. Where the intermingled employees are drawn entirely from two bargaining units represented by two different unions the Board presumes that the majority of them have chosen collective bargaining as the mode of relationship with their employer. The issue then is not whether the employees should be represented by a union but rather which of the two unions should be their bargaining agent. If an overwhelming majority of the employees are members of one union the Board may, without more, declare that union to be exclusive bargaining agent for all of them (see, e.g. *Alliance Dairy Ltd.* [1966] OLRB Rep. Aug. 337). If, on the other hand, both unions represent a substantial number of employees the Board may, pursuant to section 55(8), order a representation vote by which the employees choose which of the two unions will be their bargaining agent. (e.g. *The Borden Company Limited* [1970] OLRB Rep. Jan. 1244). The result of the vote will inevitably extinguish one trade union's bargaining rights and collective agreement.

Subsequently, the Board noted as follows:

43. Sometimes the policy of the Act to preserve collective bargaining rights will result in two collective agreements existing side by side. That would have happened in this case if the transferred employees had come from another plant of the employer with its own collective agreement negotiated with another union containing a scope clause overlapping the scope clause in the collective agreement in force in the newly purchased plant. In that situation the policy of the Act to preserve established bargaining rights would require the employer to respect both collective agreements until a Board order could be made determining which union and which collective agreement should have precedence. The wording of section 55(6) anticipates that situation and provides the mechanism to resolve it.

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36. In *Caressant Care* (1985), *supra*, the Board stated as follows

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16. The respondent also argues that the Board, because of the onerous nature of the collective agreement, should exercise its power under section 63(6)(a) to declare that the Willson collective agreement no longer is binding upon the respondent even if the union *wins* the vote. This is rather an astonishing submission. It is apparent that section 63(6)(a) would operate to cause the Board to do just that if the union were to *lose* the vote. The respondent would then be free to operate the entire Nursing Home, rather than just a part, on the basis of its own policies and employment terms and conditions (although obviously the provisions of the *Labour Relations Act* continue in such situations to act as a safeguard against any form of discrimination against formerly unionized employees). But if the union *wins* the vote, it surely should not be in a worse position, vis-a-vis the

collective agreement, than it had been at the new facility *prior* to the vote. The Board therefore wishes to make it clear that, an opportunity having been granted for a representation vote to cure the anomaly of the respondent's two "intermingled" businesses being operated one under the terms and conditions of a collective agreement and one not, the result of a vote in favour of the union will mean that the terms and conditions of the Willson collective agreement will apply to the *entire* Nursing Home until, in accordance with the *Hospital Labour Disputes Arbitration Act*, a new collective agreement has been entered into between the parties.

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37. If it is appropriate for the collective agreement to apply to the entire bargaining unit after the vote when formerly part of the unit was not unionized as in *Caressant Care (supra)*, it is certainly appropriate for it to apply to the whole bargaining unit when part of the unit was formerly represented by a different union.

38. The Board therefore finds that under the scheme of section 69 of the Act it is anticipated that the collective agreement of the union which is successful in a representation vote between two unions will apply to the entire bargaining unit. This is accomplished by declaring that one collective agreement no longer binds the employer and by amending the successful union's bargaining unit description to reflect the bargaining unit that the Board has declared to be appropriate under section 69(b).

What impact, if any, does the fact that the parties are in the statutory freeze have?

39. The circumstances of this particular case do appear to fall within section 69(3) of the Act. All of the unions have given notice to bargain to the predecessor or the successor employer and are therefore covered by the statutory freeze. However, that does not necessarily determine what the "frozen" terms and conditions of employment are. O.P.S.E.U. argues that they are the terms and conditions that governed the individual employees as of the date of the vote, that is, the terms and conditions of the former collective agreements no matter who wins the vote. The effect of this is that the employees will continue to work side by side doing the same work while being governed by different terms and conditions of employment until the HLDAA interest arbitration process for 1997-1999 has been completed. It also means that the successful union will be responsible for monitoring the statutory freeze for terms and conditions that it has never negotiated and with which it has no familiarity. Furthermore, it is a fact of life in hospital sector labour relations that parties are almost always in the statutory freeze period as they rarely have a current collective agreement. Therefore, the expectation that the terms of the successful union's collective agreement will apply to the bargaining unit after a vote would almost never pertain in the hospital sector.

40. However, the result suggested by O.P.S.E.U. above only pertains if the Board's declarations under section 69(a) and (d) are prospective. If they are prospective, the Board can only declare an existing collective agreement to not bind a successor or to amend an existing collective agreement. On that theory, as there are no existing collective agreements in this case, there is nothing upon which the Board may exercise that power. However, in *Kitchener Waterloo, supra*, the Board indicated that declarations in successorship cases may be made effective at an earlier date than their issuance.

11. In our view section 64(6) does give the Board the jurisdiction to make its declarations terminating bargaining rights and declaring that a collective agreement no longer applies effective at a time earlier than the date of issuing the declarations.

12. The starting point of the Board's analysis is the purpose of section 64: to preserve, through a variety of legal transactions, the bargaining rights enjoyed by a union and the rights of the employees it represents. This statutory purpose or mischief against which the legislation is directed is relevant in assessing many issues under section 64, not only whether a "sale" has occurred. Section 64(6) is perhaps the most sensitive tool that can be utilized in appropriate circumstances by

the Board to ensure that the purpose of section 64 is furthered, and to work out problems which result from a "sale" finding in cases of intermingling. There can be no serious question that the Board has a discretion under section 64(6) with respect to the exercise of its various powers contained therein. That discretion should be exercised in a manner contemplated by the legislation, consistent with the mischief section 64 is directed to, and the overall mandate of the Board to make sound labour relations judgements.

13. When events occur that lead an employer or union to assert that a sale has occurred, the provisions of section 64 require parties to continue to respect those rights and obligations in the absence of any application to the Board and until the Board otherwise declares. This approach removes any hiatus in the representation rights and collective agreement obligations while any dispute is being resolved. And it must be so. Otherwise, employers could delay applications and in practice defeat the purpose of section 64, to preserve existing rights. Employers could engage in a series of corporate transactions, which if timed properly, could have the effect of forever avoiding any collective bargaining obligations. The "default" mode of the legislation, that rights continue to apply until the Board determines otherwise, eliminates this problem. This is why subsections 64(2) and (3) are written in a manner stipulating that obligations continue to apply "until the Board otherwise declares". It is why the relevant words in subsection 64(6) mean that the collective agreement continues to apply until the Board makes a declaration that the successor employer "is no longer bound". They do not mean that the successor will always be bound until the date of the Board declaration.

14. The purpose of section 64 is to ensure that bargaining rights and collective agreement obligations carry forward with no interruption through legal transactions and legal litigation. The purpose is to ensure that rights that ought to be preserved do not lapse in the "in-between" times. But where, for sound labour relations reasons, the Board concludes that those rights ought to be terminated, the statutory scheme does not demand that the terminated rights continue until the date of the Board's decision. To read section 64(6) in this manner would undercut the purpose of section 64. It would serve to extend bargaining rights until applications could be disposed of, rather than severing them at the time the Board, as directed by the legislation, determines it is appropriate to do so. It would also interpret section 64(6) in a manner that could lead to absurd results.

15. If the orders or declarations could never be effective earlier than the date of the Board's decision, there would regularly occur serious labour relations problems. One example arises when two inconsistent collective agreements cover the two intermingled businesses. Each union could file grievances under its collective agreement. An employer would likely be in the position of breaching one of those agreements regardless of what it did. Even if bargaining rights were later terminated by the Board, or if it later declared which collective agreement applied, a successor employer would still have breached one of the agreements during the time before the declaration issued, with potentially enormous liability given the time necessary in some cases to litigate these disputes. This is, with respect, an absurd result, one that flows from the interpretation that the Board is without jurisdiction to make its declarations under subsection (6) effective earlier than the date the declarations are made.

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23. As a general proposition, significant labour relations problems are likely to result when bargaining rights and the collective agreement are terminated, yet nevertheless continue to apply for a period of time to the intermingled business. This is particularly true in a union-union context, where two collective agreements might apply, until the Board otherwise declared. It is easy to see why declarations terminating bargaining rights for one of the unions and its collective agreement ought ordinarily to be made retroactive to the point of sale. Otherwise, there will always be a period during which the two potentially inconsistent collective agreements apply, with the resulting uncertainty, problems, and costs for all interested parties.

41. In this case, what would be the effect of making the Board's declaration retroactive? The benefit would be that when the terms of the "new" collective agreements are issued in the interest arbitration awards and immediately frozen, the same terms will apply to everybody in the bargaining unit. This has the benefit of resolving the labour relations problems which gave rise to the application in the first place and to giving effect to the result anticipated by declarations under section 69(6).

Furthermore, it would be clear when the “open period” was and the same “open period” would apply to the entire bargaining unit. It is not necessary to make the declarations retroactive to the date of the sale to achieve this result, and it would not be in the parties’ best interests to do so as they have conducted their labour relations for two years on the understanding that they are in separate bargaining units. It is only necessary to make the declarations retroactive to the date of the application, April 4, 1997, the date when presumably it was apparent to all the parties that the former understanding no longer prevailed. In these circumstances, it is therefore appropriate to make the Board’s declarations under section 69(6) retroactive to the date of the application.

42. The Board’s determinations in this case are obviously somewhat premature as the vote has not yet been held and it is therefore not possible to make any actual orders. However, the parties were unanimously of the view that they, and the employees who were going to participate in the vote, were entitled to, and needed to, know the terms and conditions of employment that would govern them after the vote. In view of what little the Board has said on this subject in the past and the parties’ apparent agreement that a sale had occurred and a vote should be held, the Board considered it appropriate to hear and decide the issue raised. I will, of course, remain seized to deal with any further matters arising from this application and to make the appropriate declarations after the vote, including the requested declaration with respect to the paramedical unit.

COURT PROCEEDINGS

0387-96-R; 0453-96-U (Court File Nos. 235/97 & 247/97) Wal-Mart Canada Inc., Applicant v. United Steelworkers of America and the Ontario Labour Relations Board, Respondents; Tiziani Alfini et al., Applicants v. The Ontario Labour Relations Board, Janice Johnston, Vice-Chair, H. Peacock, Board Member and R.W. Pirrie, Board Member and United Steelworkers of America, Respondents

Certification - Certification Where Act Contravened - Charter of Rights - Constitutional Law - Judicial Review - Representation Vote - Board concluding that conduct of employer in circulating amongst employees and engaging them in individual and group discussions regarding the union violating section 70 of the Act - Employer’s refusal to answer questions regarding closing of store if union certified amounting to intentionally generated implied threat to employees’ job security and also violating the Act - Board concluding that results of representation vote not disclosing employees’ true wishes, that no remedy short of automatic certification sufficient to counter effect of employer contraventions, and that union holding membership support sufficient for collective bargaining - Union certified under section 11 of the Act - Applications for judicial review brought by employer and by objecting employees dismissed by Divisional Court

Board decision reported at [1997] OLRB Rep. Jan./Feb. 141.

Ontario Court (General Division) (Divisional Court), Archie Campbell, Then and Matlow JJ., July 24, 1997.

Archie Campbell J. (Endorsement): The Board said in paragraph 44 that

...the conduct of the employer, namely the strategy of having four managers constantly engaging employees in conversations about the union, was not the breach of the Act of the conduct in and of itself that led us to conclude that it was appropriate to certify the union pursuant to section 11.

The Board however did not base its decision solely on the company's refusal to answer the employees' "overwhelming" concern that they would lose their jobs if they voted for the union. The Board based its decision on the combined effect of that action together with the overall context of the employer's anti union campaign.

It is evident from paragraph 50 of the Board's decision that it considered whether any other remedy would have been sufficient to counter the effects of the employer's contravention. Although the Board's reasoning with respect to remedy could have been much more extensive, and could have canvassed alternative remedies, it was open to the Board on all the evidence to certify the union on the basis of its finding that the employer's campaign, including the threats to job security, would follow the employees into the voting booth in a second representation vote and render it meaningless.

The Board considered the unique facts of this case and came to its own conclusions on the evidence before it, which it was entitled to do.

Judicial review is a discretionary remedy. The applicants' *Charter* arguments were not raised before the Board. We do not have the benefit of the Board's labour relations expertise on this issue in the factual context of this case. Fundamentals issues such as the constitutional validity of s. 11 of the Labour Relations Act should not be decided by this court without the assistance of a considered decision of the OLRB. See, generally, *Cuddy Chicks v. OLRB* (1991) 81 D.L.R. (4th) 121.

The applications are dismissed.

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APPLICATIONS DISPOSED OF BY THE ONTARIO LABOUR RELATIONS BOARD DURING JUNE 1997

APPLICATIONS FOR CERTIFICATION

Bargaining Agents Certified Under Section 11 of the Act

0831-96-R: IBEW Construction Council of Ontario (Applicant) v. Pietro Electric Limited (Respondent)

Unit: "all electricians and electricians' apprentices in the employ of Pietro Electric Limited in the industrial, commercial and institutional sector of the construction industry in the Province of Ontario, and all electricians and electricians' apprentices in the employ of Pietro Electric Limited in all sectors of the construction industry in the Counties of Essex and Kent, excluding the industrial, commercial and institutional sector, save and except non-working foremen and persons above the rank of non-working foreman" (10 employees in unit)

Bargaining Agents Certified Subsequent to Vote

0364-96-R: Carpenters and Allied Workers Local 27, United Brotherhood of Carpenters and Joiners of America (Applicant) v. Donovan Services Ltd. (Respondent)

Unit: "all carpenters and carpenters' apprentices in the employ of Donovan Services Ltd. in the industrial, commercial and institutional sector of the construction industry in the Province of Ontario and all carpenters and carpenters' apprentices in the employ of Donovan Services Ltd. in all other sectors in the Municipality of Metropolitan Toronto, the Regional Municipalities of Peel and York, the Towns of Oakville and Halton Hills and that portion of the Town of Milton within the geographic Townships of Esquesing and Trafalgar, and the Towns of Ajax and Pickering in the Regional Municipality of Durham, save and except non-working foremen and persons above the rank of non-working foreman" (3 employees in unit)

Number of names of persons on revised voters' list	3
Number of names of persons on revised voters' list	3
Number of persons who cast ballots	3
Number of ballots marked in favour of applicant	3

1181-96-R: United Steelworkers of America (Applicant) v. Aylmer Toolcraft Limited (Respondent)

Unit: "all employees of Aylmer Toolcraft Limited in the Town of Aylmer, save and except supervisors, persons above the rank of supervisor, office, clerical and sales staff and persons regularly employed for not more than 24 hours per week" (14 employees in unit)

Number of names of persons on revised voters' list	15
Number of persons who cast ballots	15
Number of ballots excluding segregated ballots cast by persons whose names appear on voter's list	14
Number of segregated ballots cast by persons whose names appear on voter's list	1
Number of segregated ballots cast by persons whose names do not appear on voters' list	0
Number of spoiled ballots	0
Number of ballots marked in favour of applicant	11
Number of ballots marked against applicant	3
Number of ballots segregated and not counted	1

2326-96-R: CUPW Union of Technical Employees (Applicant) v. Canadian Union of Postal Workers (Respondent)
v. Ottawa Newspaper Guild (Intervener)

Unit: "all employees of the Canadian Union of Postal Workers, save and except the accountant, the systems manager, elected official of the employer and persons in bargaining units for which any trade union held bargaining rights as of November 5, 1996" (15 employees in unit) (*Having regard to the agreement of the parties*)

Number of names of persons on revised voters' list	15
Number of persons who cast ballots	14
Number of spoiled ballots	0
Number of ballots marked in favour of applicant	14
Number of ballots marked in favour of intervener	0
Number of ballots segregated and not counted	0

2736-96-R: Millwright Local 1410 (Applicant) v. Alcan Aluminium Limited (Respondent) v. Alcan Chemicals, Division of Alcan Aluminium Limited ("Chemicals"); Alcan Rolled Products ("Rolled Products"); Alcan Cable ("Cable"); Alcan Foil Products ("Foil"); United Steelworkers of America, Local 7949 and Local 8754 ("Steelworkers"); International Association of Machinists and Aerospace Workers, Lodge 54 ("Machinists") (Interveners)

Unit: "all millwrights and millwrights' apprentices in the employ of Alcan Aluminium Limited in the industrial, commercial and institutional sector of the construction industry in the Province of Ontario, save and except millwrights and millwrights' apprentices employed under the United Steelworkers of America, Local 8754 collective agreement at the Alcan Foil Products Plant in the Municipality of Metropolitan Toronto, millwrights and millwrights' apprentices employed under the United Steelworkers of America, Local 7949 collective agreement at the Alcan Cable Plant in Bracebridge, and millwrights and millwrights' apprentices employed under the International Association of Machinists and Aerospace Workers Lodge 54 collective agreement at the Alcan Rolled Products Company Plant in Kingston, save and except non-working foremen and persons above the rank of non-working foreman all millwrights and millwrights' apprentices in all other sectors of the construction industry; that is, excluding the industrial, commercial and institutional sector, in the geographic Townships of Elizabethtown, Augusta and Edwardsburg and all lands south thereof in the United Counties of Leeds and Grenville, save and except non-working foremen and persons above the rank of non-working foreman" (6 employees in unit)

Number of names of persons on list as originally prepared by employer	
Number of names of persons on revised voters' list	6
Number of persons who cast ballots	5
Number of ballots, excluding segregated ballots, cast by persons whose names appear on voters' list	5
Number of ballots marked in favour of applicant	5

2743-96-R: United Association of Journeymen and Apprentices of the Plumbing and Pipefitting Industry of the United States and Canada, Local 221 ("U.A.") (Applicant) v. Alcan Aluminum Limited (Respondent) v. Alcan Chemicals, Division of Alcan Aluminium Limited ("Chemicals"); Alcan Rolled Products ("Rolled Products"); Alcan Cable ("Cable"); Alcan Foil Products ("Foil"); United Steelworkers of America, Local 7949 and Local 8754 ("Steelworkers"); International Association of Machinists and Aerospace Workers, Lodge 54 ("Machinists") (Interveners)

Unit: "all plumbers, plumbers' apprentices, steamfitters and steamfitters' apprentices in the employ of Alcan Aluminium Limited in the industrial, commercial and institutional sector of the construction industry in the Province of Ontario, save and except plumbers, plumbers' apprentices, steamfitters and steamfitters' apprentices employed under the International Association of Machinists and Aerospace Workers Lodge 54 collective agreement at Alcan Rolled Products Company Plant in Kingston, save and except non-working foremen and persons above the rank of non-working foreman all plumbers, plumbers' apprentices, steamfitters and steamfitters' apprentices in the employ of Alcan Aluminium Limited in all other sectors of the construction industry; that is, excluding the industrial, commercial and institutional sector, in the geographic Townships of Elizabethtown, Augusta and Edwardsburg and all lands south thereof in the United Counties of Leeds and Grenville, save and except non-working foremen and persons above the rank of non-working foreman" (16 employees in unit)

Number of names of persons on revised voters' list	16
Number of persons who cast ballots	14
Number of ballots excluding segregated ballots cast by persons whose names appear on voter's list	14

Number of ballots marked in favour of applicant

14

2958-96-R: United Brotherhood of Carpenters and Joiners of America (Applicant) v. The Board of Education for the City of Toronto (Respondent)

Unit: “all carpenters and carpenters’ apprentices in the employ of The Board of Education for the City of Toronto in the industrial, commercial and institutional sector of the construction industry in the Province of Ontario, and all carpenters and carpenters’ apprentices in the employ of The Board of Education for the City of Toronto in all sectors of the construction industry in the Municipality of Metropolitan Toronto, the Regional Municipalities of Peel and York, the Towns of Oakville and Halton Hills and that portion of the Town of Milton within the geographic Townships of Esquesing and Trafalgar, and the Towns of Ajax and Pickering in the Regional Municipality of Durham, excluding the industrial, commercial and institutional sector, save and except non-working foremen and persons above the rank of non-working foreman” (65 employees in unit) (*Having regard to the agreement of the parties*) (*Clarity Note*)

Number of names of persons on revised voters’ list	60
Number of persons who cast ballots	66
Number of ballots excluding segregated ballots cast by persons whose names appear on voter’s list	66
Number of ballots marked in favour of applicant	64
Number of ballots marked against applicant	1

3011-96-R: International Union of Bricklayers and Allied Craftsmen, Local 2 (Applicant) v. The Board of Education for the City of Toronto (Respondent)

Unit: “all journeymen and apprentice bricklayers, stonemasons and plasters and improvers in the employ of The Board of Education for the City of Toronto in the industrial, commercial and institutional sector of the construction industry in the Province of Ontario, and all journeymen and apprentice bricklayers, stonemasons and plasterers and improvers in the employ of The Board of Education for the City of Toronto in all sectors of the construction industry in the Municipality of Metropolitan Toronto, the Regional Municipalities of Peel and York, the Towns of Oakville and Halton Hills and that portion of the Town of Milton within the geographic Townships of Esquesing and Trafalgar, and the Towns of Ajax and Pickering in the Regional Municipality of Durham, excluding the industrial, commercial and institutional sector, save and except non-working foremen and persons above the rank of non-working foreman” (15 employees in unit) (*Having regard to the agreement of the parties*) (*Clarity Note*)

Number of names of persons on revised voters’ list	16
Number of persons who cast ballots	15
Number of ballots excluding segregated ballots cast by persons whose names appear on voter’s list	15
Number of ballots marked in favour of applicant	14
Number of ballots marked against applicant	1

3027-96-R: International Union of Bricklayers and Allied Craftsmen, Local 31 (Applicant) v. The Board of Education for the City of Toronto (Respondent)

Unit: “all journeymen and apprentice marble, tile, terrazzo, cement masons, resilient floor layers, and their helpers in the employ of The Board of Education for the City of Toronto in the industrial, commercial and institutional sector of the construction industry in the Province of Ontario, and all journeymen and apprentice marble, tile, terrazzo, cement masons, resilient floor layers, and their helpers in the employ of The Board of Education for the City of Toronto in all sectors of the construction industry in the Municipality of Metropolitan Toronto, the Regional Municipalities of Peel and York, the Towns of Oakville and Halton Hills and that portion of the Town of Milton within the geographic Townships of Esquesing and Trafalgar, and the Towns of Ajax and Pickering in the Regional Municipality of Durham, excluding the industrial, commercial and institutional sector, save and except non-working foremen and persons above the rank of non-working foreman” (2 employees in unit) (*Having regard to the agreement of the parties*) (*Clarity Note*)

Number of names of persons on revised voters’ list	2
Number of persons who cast ballots	2

Number of ballots marked in favour of applicant	2
Number of ballots marked against applicant	0

3748-96-R: Canadian Union of Public Employees (Applicant) v. Saint Elizabeth Health Care (Respondent)

Unit: "all office and clerical employees of Saint Elizabeth Health Care in the Regional Municipality of Metropolitan Toronto, save and except supervisors and those above the rank of supervisor" (40 employees in unit) (*Having regard to the agreement of the parties*)

Number of names of persons on revised voters' list	73
Number of persons who cast ballots	60
Number of ballots excluding segregated ballots cast by persons whose names appear on voter's list	60
Number of ballots marked in favour of applicant	33
Number of ballots marked against applicant	27

3997-96-R: Ontario Nurses' Association (Applicant) v. Hamilton Health Sciences Corporation (Respondent)

Unit: "all registered and graduate nurses employed by Hamilton Health Sciences Corporation at the McMaster site at Hamilton engaged in a nursing capacity, save and except unit or focus managers or program directors, persons above those ranks, and save and except assistant unit managers, clinical specialists/clinical nurse specialist, and clinical nurse specialists/neonatal practitioners" (725 employees in unit)

Number of names of persons on revised voters' list	747
Number of persons who cast ballots	531
Number of ballots excluding segregated ballots cast by persons whose names appear on voter's list	493
Number of segregated ballots cast by persons whose names appear on voter's list	28
Number of segregated ballots cast by persons whose names do not appear on voters' list	10
Number of spoiled ballots	0
Number of ballots marked in favour of applicant	330
Number of ballots marked against applicant	166
Number of ballots segregated and not counted	35

0009-97-R: The Canadian Union of Operating Engineers and General Workers (Applicant) v. 95467 Ontario Ltd. c.o.b. as Pet-Pak Containers (Respondent)

Unit: "all employees of Pet-Pak Containers in the Regional Municipality of Peel, save and except supervisors and technicians, persons above the rank of supervisors and technicians, office and clerical staff" (2 employees in unit) (*Having regard to the agreement of the parties*)

Number of names of persons on revised voters' list	99
Number of persons who cast ballots	93
Number of ballots excluding segregated ballots cast by persons whose names appear on voter's list	90
Number of segregated ballots cast by persons whose names appear on voter's list	3
Number of spoiled ballots	4
Number of ballots marked in favour of applicant	52
Number of ballots marked against applicant	34
Number of ballots segregated and not counted	3

0304-97-R: Canadian Union of Public Employees (Applicant) v. The Corporation of the Township of Plummer Additional (Respondent)

Unit: "all employees of The Corporation of the Township of Plummer Additional, save and except working foreman and persons above the rank of working foreman" (4 employees in unit) (*Having regard to the agreement of the parties*)

Number of names of persons on revised voters' list	4
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Number of persons who cast ballots	4
Number of ballots excluding segregated ballots cast by persons whose names appear on voter's list	3
Number of segregated ballots cast by persons whose names appear on voter's list	1
Number of ballots marked in favour of applicant	3
Number of ballots marked against applicant	0
Number of ballots segregated and not counted	1

0337-97-R: IBEW Construction Council of Ontario (Applicant) v. Sferrazza Developments Limited (Respondent)

Unit: "all electricians and electricians' apprentices in the employ of Sferrazza Developments Limited in the industrial, commercial and institutional sector of the construction industry in the Province of Ontario, and all electricians and electricians' apprentices in the employ of Sferrazza Developments Limited in all sectors of the construction industry in the Regional Municipality of Hamilton-Wentworth, the City of Burlington, that portion of the geographic Township of Beverly annexed by North Dumfries Township and that portion of the Town of Milton within the geographic Townships of Nassagaweya and Nelson, excluding the industrial, commercial and institutional sector, save and except non-working foremen and persons above the rank of non-working foreman" (8 employees in unit)

Number of names of persons on revised voters' list	7
Number of persons who cast ballots	6
Number of ballots marked in favour of applicant	6
Number of ballots marked against applicant	0

0402-97-R: The Township of Wainfleet Employees Association (Applicant) v. The Corporation of the Township of Wainfleet (Respondent)

Unit: "all employees of the employer in the Township of Wainfleet, save and except supervisors and persons above the rank of supervisor" (15 employees in unit) (*Having regard to the agreement of the parties*)

Number of names of persons on revised voters' list	16
Number of persons who cast ballots	16
Number of ballots excluding segregated ballots cast by persons whose names appear on voter's list	15
Number of segregated ballots cast by persons whose names appear on voter's list	1
Number of ballots marked in favour of applicant	11
Number of ballots marked against applicant	4
Number of ballots segregated and not counted	1

0439-97-R: Office & Professional Employees International Union (Applicant) v. Corporation-Marathon Day Care Program (Respondent)

Unit: "all employees of Corporation-Marathon Day Care Program in the Town of Marathon, save and except supervisors and persons above the rank of supervisor" (9 employees in unit) (*Having regard to the agreement of the parties*)

Number of names of persons on revised voters' list	18
Number of persons who cast ballots	12
Number of ballots excluding segregated ballots cast by persons whose names appear on voter's list	12
Number of ballots marked in favour of applicant	10
Number of ballots marked against applicant	2

0442-97-R: Teamsters Local Union 91 (Applicant) v. 2889218 Canada Inc. c.o.b. Exel Environmental (Respondent)

Unit: "all employees of 2889218 Canada Inc. c.o.b. Exel Environmental in the Regional Municipality of Ottawa-Carleton, save and except supervisors, persons above the rank of supervisor, office, clerical and sales staff" (55 employees in unit) (*Having regard to the agreement of the parties*)

Number of names of persons on revised voters' list	70
Number of persons who cast ballots	55
Number of ballots excluding segregated ballots cast by persons whose names appear on voter's list	46
Number of segregated ballots cast by persons whose names appear on voter's list	5
Number of segregated ballots cast by persons whose names do not appear on voters' list	4
Number of ballots marked in favour of applicant	38
Number of ballots marked against applicant	8
Number of ballots segregated and not counted	9

0485-97-R: United Brotherhood of Retail, Food, Industrial & Service Trades International Union (Applicant) v. Extra Personnel Services (Respondent)

Unit: "all employees of Extra Personnel Services in the Province of Ontario working at various locations and dispatched from 7171 Torbram Road, Mississauga, Ontario, excluding supervisors, persons above the rank of supervisor, office and clerical staff working directly for Extra Personnel Services" (8 employees in unit) (*Having regard to the agreement of the parties*)

Number of names of persons on revised voters' list	8
Number of persons who cast ballots	8
Number of ballots excluding segregated ballots cast by persons whose names appear on voter's list	8
Number of ballots marked in favour of applicant	8
Number of ballots marked against applicant	0

0499-97-R: United Food and Commercial Workers International Union, Local 175 (Applicant) v. 412238 Ontario Limited c.o.b. as Comfort Inn - Belleville (Respondent)

Unit: "all employees of 412238 Ontario Limited c.o.b. as Comfort Inn by Journey's end at its Motel at 200 North Park Street, in the City of Belleville, save and except Assistant Manager, persons above the rank of Assistant Manager, students employed during the school vacation period and persons in bargaining units for whom any trade union held bargaining rights as of May 8, 1997" (8 employees in unit) (*Having regard to the agreement of the parties*)

Number of names of persons on revised voters' list	8
Number of persons who cast ballots	8
Number of ballots excluding segregated ballots cast by persons whose names appear on voter's list	8
Number of ballots marked in favour of applicant	8
Number of ballots marked against applicant	0

0544-97-R: Canadian Union of Postal Workers (Applicant) v. Russell A. Farrow Ltd. (Respondent)

Unit: "all employees of Russell A. Farrow Ltd., in the City of Windsor, save and except supervisors, persons above the rank of supervisor, customs brokers or agents, office, clerical and sales staff" (21 employees in unit) (*Having regard to the agreement of the parties*)

Number of names of persons on revised voters' list	27
Number of persons who cast ballots	24
Number of ballots excluding segregated ballots cast by persons whose names appear on voter's list	19
Number of segregated ballots cast by persons whose names appear on voter's list	5
Number of ballots marked in favour of applicant	12
Number of ballots marked against applicant	7
Number of ballots segregated and not counted	5

0547-97-R: United Steelworkers of America (Applicant) v. Autostock Distribution, A Division of TCG International Inc. (Respondent)

Unit: "all employees of Autostock Distribution, A Division of TCG International Inc. in the City of Kitchener, save and except Supervisor and persons above the rank of Supervisor, Office and Clerical staff" (6 employees in unit) (*Having regard to the agreement of the parties*)

Number of names of persons on revised voters' list	6
Number of persons who cast ballots	6
Number of ballots excluding segregated ballots cast by persons whose names appear on voter's list	6
Number of ballots marked in favour of applicant	4
Number of ballots marked against applicant	2

0556-97-R: International Association of Machinists and Aerospace Workers (Applicant) v. Toronto Area Transit Operating Authority ("GO Transit") (Respondent)

Unit: "all of the employees, employed by GO Transit, working at the call centre in the Public Communication and Compliance Department, located at 20 Bay Street in the City of Toronto, save and except supervisors and persons above the rank of supervisor" (21 employees in unit)

Number of names of persons on revised voters' list	21
Number of persons who cast ballots	19
Number of ballots excluding segregated ballots cast by persons whose names appear on voter's list	19
Number of ballots marked in favour of applicant	11
Number of ballots marked against applicant	8

0578-97-R: United Steelworkers of America (Applicant) v. Intertec Security and Investigation Limited (Respondent)

Unit: "all employees of Intertec Security and Investigation Limited working at 49 Truman Road in the City of Barrie, save and except site supervisors and persons above the rank of site supervisor" (5 employees in unit) (*Having regard to the agreement of the parties*)

Number of names of persons on revised voters' list	4
Number of persons who cast ballots	3
Number of spoiled ballots	0
Number of ballots marked in favour of applicant	3
Number of ballots marked in favour of intervener	0

0616-97-R: Practical Nurses Federation of Ontario (Applicant) v. St. Elizabeth Visiting Nurses Association of the Diocese of Hamilton (Respondent)

Unit: "all registered and graduate practical nurses engaged in a capacity for which registration as a practical nurse is required, employed by the St. Elizabeth Visiting Nurses Association of the Diocese of Hamilton in the Regional Municipality of Hamilton-Wentworth, save and except supervisors and managers and persons above the rank of supervisor and manager" (35 employees in unit) (*Having regard to the agreement of the parties*)

Number of names of persons on revised voters' list	38
Number of persons who cast ballots	30
Number of ballots excluding segregated ballots cast by persons whose names appear on voter's list	29
Number of segregated ballots cast by persons whose names do not appear on voters' list	1
Number of ballots marked in favour of applicant	27
Number of ballots marked against applicant	2
Number of ballots segregated and not counted	1

0624-97-R: United Steelworkers of America (Applicant) v. Carleton Condominium Corporation #25 (Respondent)

Unit: "all security guards employed by Carleton Condominium Corporation #25 in the Regional Municipality of Ottawa-Carleton, save and except Site Supervisor, persons above the rank of Site Supervisor, and office and clerical staff" (9 employees in unit) (*Having regard to the agreement of the parties*)

Number of names of persons on revised voters' list	9
Number of persons who cast ballots	9
Number of ballots excluding segregated ballots cast by persons whose names appear on voter's list	8
Number of segregated ballots cast by persons whose names appear on voter's list	1
Number of ballots marked in favour of applicant	5
Number of ballots marked against applicant	3
Number of ballots segregated and not counted	1

0642-97-R: Local 636 of The International Brotherhood of Electrical Workers (Applicant) v. The Town of Carleton Place Hydro-Electric Commission (Respondent)

Unit: "all employees of The Town of Carleton Place Hydro-Electric Commission in the Town of Carleton Place, save and except General Manager, and those above the rank of General Manager" (9 employees in unit) (*Having regard to the agreement of the parties*)

Number of names of persons on revised voters' list	9
Number of persons who cast ballots	9
Number of ballots excluding segregated ballots cast by persons whose names appear on voter's list	8
Number of segregated ballots cast by persons whose names appear on voter's list	1
Number of ballots marked in favour of applicant	9
Number of ballots marked against applicant	0

0663-97-R: Labourers' International Union of North America, Local 183 (Applicant) v. Hurley Corporation (Respondent)

Unit: "all employees of Hurley Corporation engaged in cleaning and maintenance at 243, 245, 251 and 255 Consumers Road, in the Municipality of Metropolitan Toronto, save and except supervisors, persons above the rank of supervisor, office and clerical staff" (27 employees in unit) (*Having regard to the agreement of the parties*)

Number of names of persons on revised voters' list	31
Number of persons who cast ballots	25
Number of ballots excluding segregated ballots cast by persons whose names appear on voter's list	25
Number of ballots marked in favour of applicant	17
Number of ballots marked against applicant	8

0668-97-R: Communications, Energy & Paperworkers Union of Canada (Applicant) v. Victorian Order of Nurses - Sudbury Branch (Respondent)

Unit: "all employees of the Victorian Order of Nurses - Sudbury Branch in the Town of Espanola, save and except nurse manager, persons above the rank of nurse manager, caseload planners, billings clerks, co-ordinators, homemakers, home maintenance staff and program assistants" (24 employees in unit)

Number of names of persons on revised voters' list	28
Number of persons who cast ballots	19
Number of ballots excluding segregated ballots cast by persons whose names appear on voter's list	16
Number of segregated ballots cast by persons whose names appear on voter's list	3
Number of ballots marked in favour of applicant	16
Number of ballots marked against applicant	0
Number of ballots segregated and not counted	3

0669-97-R: Communication, Energy & Paperworkers' Union of Canada, Local 1104 - Association of Toronto Secondary School Secretaries (Applicant) v. The Board of Education for the City of Toronto (Respondent)

Unit: "all employees employed as hall monitors by The Board of Education for the city of Toronto in its secondary schools, save and except supervisors, persons above the rank of supervisor and students employed during the school vacation period" (48 employees in unit) (*Having regard to the agreement of the parties*)

Number of names of persons on revised voters' list	51
Number of persons who cast ballots	25
Number of ballots excluding segregated ballots cast by persons whose names appear on voter's list	25
Number of ballots marked in favour of applicant	25
Number of ballots marked against applicant	0

0678-97-R: International Brotherhood of Electrical Workers, Local Union 353 (Applicant) v. 1156992 Ontario Limited c.o.b. as P.N.P. Electric (Respondent)

Unit: "all electricians and electricians' apprentices in the employ of 1156992 Ontario Limited c.o.b. as P.N.P. Electric in the industrial, commercial and institutional sector of the construction industry in the Province of Ontario, and all electricians and electricians' apprentices in the employ of 1156992 Ontario Limited c.o.b. as P.N.P. Electric in all sectors of the construction industry in the Municipality of Metropolitan Toronto, the Regional Municipalities of Peel and York, the Towns of Oakville and Halton Hills and that portion of the Town of Milton within the geographic Townships of Esquesing and Trafalgar, and the Towns of Ajax and Pickering in the Regional Municipality of Durham, excluding the industrial, commercial and institutional sector, save and except non-working foremen and persons above the rank of non-working foreman" (3 employees in unit)

Number of names of persons on revised voters' list	3
Number of persons who cast ballots	3
Number of ballots excluding segregated ballots cast by persons whose names appear on voter's list	3
Number of ballots marked in favour of applicant	3
Number of ballots marked against applicant	0

0699-97-R: Teamsters Local Union No. 419 (Applicant) v. Euclid Industries Canada Ltd. (Respondent)

Unit: "all employees of Euclid Industries Canada Ltd. at 731 Gana Court, in the City of Mississauga, Ontario, save and except supervisors, persons above the rank of supervisor, students employed during the school vacation period, and office and sales staff" (22 employees in unit) (*Having regard to the agreement of the parties*)

Number of names of persons on revised voters' list	22
Number of persons who cast ballots	17
Number of ballots excluding segregated ballots cast by persons whose names appear on voter's list	17
Number of ballots marked in favour of applicant	12
Number of ballots marked against applicant	5

0710-97-R: United Steelworkers of America (Applicant) v. L. E. Taylor Associates Ltd. (Respondent)

Unit: "all employees of L. E. Taylor Associates Ltd. in the City of Hamilton, save and except supervisors, persons above the rank of supervisor, office, clerical and sales staff" (30 employees in unit) (*Having regard to the agreement of the parties*)

Number of names of persons on revised voters' list	28
Number of persons who cast ballots	27
Number of ballots excluding segregated ballots cast by persons whose names appear on voter's list	27
Number of ballots marked in favour of applicant	17
Number of ballots marked against applicant	10

0721-97-R: Industrial and Commercial Workers' Union - Unite (Applicant) v. Matra Plast Inc. (Respondent)

Unit: "all employees of Matra Plast Inc. in the Town of Long Sault, save and except supervisors and persons above the rank of supervisor, clerical staff, salespersons, students and temporary workers" (22 employees in unit) *(Having regard to the agreement of the parties)*

Number of names of persons on revised voters' list	21
Number of persons who cast ballots	19
Number of ballots excluding segregated ballots cast by persons whose names appear on voter's list	16
Number of segregated ballots cast by persons whose names appear on voter's list	3
Number of ballots marked in favour of applicant	9
Number of ballots marked against applicant	7
Number of ballots segregated and not counted	3

0725-97-R: National Automobile, Aerospace, Transportation and General Workers Union of Canada (CAW-Canada) (Applicant) v. Star Metal Manufacturing Inc. (Respondent)

Unit: "all employees of Star Metal Manufacturing Inc. in the County of Essex, save and except supervisors, those above the rank of supervisors, engineering, office and sales staff" (120 employees in unit) *(Having regard to the agreement of the parties)*

Number of names of persons on revised voters' list	97
Number of persons who cast ballots	109
Number of ballots excluding segregated ballots cast by persons whose names appear on voter's list	105
Number of segregated ballots cast by persons whose names do not appear on voters' list	4
Number of spoiled ballots	3
Number of ballots marked in favour of applicant	84
Number of ballots marked against applicant	18
Number of ballots segregated and not counted	4

0727-97-R: National Automobile, Aerospace, Transportation and General Workers Union of Canada (CAW-Canada) (Applicant) v. The Butcher Engineering Enterprises Ltd. (Respondent)

Unit: "all employees of The Butcher Engineering Enterprises Ltd. in the City of Windsor, save and except supervisors, persons above the rank of supervisor, office and sales staff, persons regularly employed for not more than twenty-four hours per week and students employed during the school vacation period" (132 employees in unit) *(Having regard to the agreement of the parties)*

Number of names of persons on revised voters' list	123
Number of persons who cast ballots	121
Number of ballots excluding segregated ballots cast by persons whose names appear on voter's list	120
Number of segregated ballots cast by persons whose names appear on voter's list	1
Number of spoiled ballots	2
Number of ballots marked in favour of applicant	64
Number of ballots marked against applicant	54
Number of ballots segregated and not counted	1

0729-97-R: London & District Service Workers' Union, Local 220, S.E.I.U., A.F.L., C.I.O., C.L.C. (Applicant) v. Chartwell Canada Corp. c.o.b. as Travelodge Hotel London (Respondent)

Unit: "all employees of Chartwell Canada Corp. c.o.b. as Travelodge Hotel London in the City of London, save and except supervisors, persons above the rank of supervisor and persons employed in the position of Night Auditor" (28 employees in unit) *(Having regard to the agreement of the parties) (Clarity Note)*

Number of names of persons on revised voters' list	28
Number of persons who cast ballots	25

Number of spoiled ballots	1
Number of ballots marked in favour of applicant	19
Number of ballots marked against applicant	5

0740-97-R: Labourers' International Union of North America Oil & Gas Technicians, Service, Domestic & General Workers Union Local 1267 (Applicant) v. Canadian Waste Services Inc. (Respondent)

Unit: "all employees of Canadian Waste Services Inc. in the Municipality of Metropolitan Toronto, save and except manager, persons above the rank of manager and persons in bargaining units for whom any trade union held bargaining rights as of June 2, 1997" (3 employees in unit) (*Having regard to the agreement of the parties*)

Number of names of persons on revised voters' list	3
Number of persons who cast ballots	3
Number of ballots excluding segregated ballots cast by persons whose names appear on voter's list	3
Number of ballots marked in favour of applicant	3
Number of ballots marked against applicant	0

0750-97-R: Ontario Nurses' Association (Applicant) v. The Community Care Access of Wellington-Dufferin (Respondent)

Unit: "all coordinators employed by The Community Care Access of Wellington-Dufferin in Wellington and Dufferin Counties, save and except the Manager and persons above the rank of Manager" (4 employees in unit) (*Having regard to the agreement of the parties*)

Number of names of persons on revised voters' list	4
Number of persons who cast ballots	4
Number of ballots excluding segregated ballots cast by persons whose names appear on voter's list	4
Number of ballots marked in favour of applicant	4
Number of ballots marked against applicant	0

0757-97-R: United Food and Commercial Workers International Union, Local 175 (Applicant) v. LOEB Inc. (Respondent)

Unit: "all employees of LOEB Inc. employed in the Town of Pickering, save and except department managers and persons above the rank of department manager, the head cashier and the bookkeeper" (125 employees in unit) (*Having regard to the agreement of the parties*)

Number of names of persons on revised voters' list	125
Number of persons who cast ballots	106
Number of ballots excluding segregated ballots cast by persons whose names appear on voter's list	106
Number of spoiled ballots	1
Number of ballots marked in favour of applicant	66
Number of ballots marked against applicant	39

0761-97-R: Service Employees International Union, Local 204, Affiliated with the S.E.I.U., A.F. of L., C.I.O. C.L.C. (Applicant) v. The Clarke Institute of Psychiatry (Respondent)

Unit: "all office and clerical employees employed at the Clarke Institute of Psychiatry in Metropolitan Toronto, save and except supervisors, persons above the rank of supervisor and those employees already covered by the existing Collective Agreement or bargaining rights held by any Trade Union" (120 employees in unit) (*Having regard to the agreement of the parties*)

Number of names of persons on revised voters' list	105
Number of persons who cast ballots	93
Number of ballots excluding segregated ballots cast by persons whose names appear on voter's list	76

Number of segregated ballots cast by persons whose names appear on voter's list	2
Number of segregated ballots cast by persons whose names do not appear on voters' list	15
Number of ballots marked in favour of applicant	57
Number of ballots marked against applicant	20
Number of ballots segregated and not counted	16

0787-97-R: Laurentian University Staff Union (Applicant) v. Laurentian University of Sudbury (Respondent) v. Canadian Union of Public Employees and its Local 1555 (Intervener)

Unit: "all employees in the Maintenance Department, Printing Department, Residence Department, save and except forepersons, persons above the rank of foreperson, office and clerical staff, porters, technical personnel, teaching staff, librarians, persons regularly employed for twenty-four hours per week or less, students employed during the school vacation periods, and persons covered by subsisting collective agreements" (21 employees in unit) (*Having regard to the agreement of the parties*)

Number of names of persons on revised voters' list	21
Number of persons who cast ballots	22
Number of ballots excluding segregated ballots cast by persons whose names appear on voter's list	22
Number of ballots marked in favour of applicant	22
Number of ballots marked in favour of intervener	0

0824-97-R: National Automobile, Aerospace, Transportation and General Workers Union of Canada (CAW-Canada) (Applicant) v. Muskoka Containerized Services Limited (Respondent)

Unit: "all employees of Muskoka Containerized Services Limited in the Districts of Muskoka and Parry Sound, save and except supervisors, persons above the rank of supervisor, office, clerical, engineering and sales staff, persons regularly employed for not more than 24 hours per week and students employed during the school vacation period" (72 employees in unit) (*Having regard to the agreement of the parties*)

Number of names of persons on revised voters' list	74
Number of persons who cast ballots	69
Number of ballots excluding segregated ballots cast by persons whose names appear on voter's list	68
Number of segregated ballots cast by persons whose names appear on voter's list	1
Number of ballots marked in favour of applicant	43
Number of ballots marked against applicant	25
Number of ballots segregated and not counted	1

0858-97-R: United Steelworkers of America (Applicant) v. Cf Group Inc. (Respondent)

Unit: "all employees of Cf Group Inc. in the Municipality of Metropolitan Toronto, save and except supervisors, persons above the rank of supervisor, office, clerical and sales staff" (100 employees in unit) (*Having regard to the agreement of the parties*)

Number of names of persons on revised voters' list	253
Number of persons who cast ballots	116
Number of ballots excluding segregated ballots cast by persons whose names appear on voter's list	68
Number of segregated ballots cast by persons whose names appear on voter's list	47
Number of segregated ballots cast by persons whose names do not appear on voters' list	1
Number of ballots marked in favour of applicant	64
Number of ballots marked against applicant	4
Number of ballots segregated and not counted	48

Applications for Certification Dismissed Subsequent to Vote

3690-96-R: Canadian Health Care Workers (Applicant) v. The Corporation of the City of St. Thomas (Respondent) v. London & District Service Workers' Union, Local 220 (Intervener)

Unit: "all employees of the Corporation of the City of St. Thomas at Valleyview Home for the Aged at St. Thomas, save and except supervisors, persons above the rank of supervisor, registered nurses and office staff" (65 employees in unit)

3730-96-R: United Food and Commercial Workers International Union, Local 175 (Applicant) v. 539290 Ontario Inc. carrying on business as Smiths R.V. Centre (Respondent)

Unit: "all employees of 539290 Ontario Inc. carrying on business as Smiths R.V. Centre in the City of Thunder Bay, save and except Department Managers and persons above the rank of Department Manager" (26 employees in unit)

Number of names of persons on revised voters' list	26
Number of persons who cast ballots	26
Number of ballots excluding segregated ballots cast by persons whose names appear on voter's list	23
Number of segregated ballots cast by persons whose names appear on voter's list	3
Number of ballots marked in favour of applicant	9
Number of ballots marked against applicant	14
Number of ballots segregated and not counted	3
Number of names of persons on revised voters' list	24
Number of persons who cast ballots	23
Number of ballots excluding segregated ballots cast by persons whose names appear on voter's list	21
Number of segregated ballots cast by persons whose names appear on voter's list	2
Number of ballots marked in favour of applicant	8
Number of ballots marked against applicant	13
Number of ballots segregated and not counted	2

4105-96-R: Labourers' International Union of North America, Local 183 (Applicant) v. Shawncro Investments Inc. c.o.b. as Lifetime Homes (Respondent)

Unit: "all construction labourers in the employ of Lifetime Homes Ontario Corporation in all sectors of the construction industry in the Municipality of Metropolitan Toronto, the Regional Municipalities of Peel and York, the Towns of Oakville and Halton Hills and that portion of the Town of Milton within the geographic Townships of Esquesing and Trafalgar, and the Towns of Ajax and Pickering in the Regional Municipality of Durham, excluding the industrial, commercial and institutional sector, save and except non-working foremen and persons above the rank of non-working foreman" (6 employees in unit)

Number of names of persons on revised voters' list	5
Number of persons who cast ballots	5
Number of ballots marked in favour of applicant	1
Number of ballots marked against applicant	1
Number of ballots segregated and not counted	3

0440-97-R: Communications, Energy and Paperworkers Union of Canada (CEP) (Applicant) v. NOVA Chemicals (Canada) Limited (Respondent)

Unit: "all employees of Novacor Chemicals (Canada) Ltd. at its Corunna Manufacturing facility, 785 Petrolia Line in Moore Township in the County of Lambton, save and except co-ordinators, persons above the rank of co-ordinator, office, sales and clerical staff, professional engineers employed in a professional capacity, Plant Nurse, Plant Physician, Security Guards and persons for whom any other trade union holds bargaining rights as of May 6, 1997" (319 employees in unit)

Number of names of persons on revised voters' list	424
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Number of persons who cast ballots	403
Number of ballots excluding segregated ballots cast by persons whose names appear on voter's list	266
Number of segregated ballots cast by persons whose names appear on voter's list	118
Number of segregated ballots cast by persons whose names do not appear on voters' list	19
Number of ballots marked in favour of applicant	136
Number of ballots marked against applicant	199
Number of ballots segregated and not counted	68

0571-97-R: Labourers' International Union of North America, Local 1081 (Applicant) v. Lafarge Construction, Lafarge Construction 47035, Lafarge Construction Materials On. 0664168 (Respondent)

Unit: "all construction labourers in the employ of Lafarge Construction, Lafarge Construction 47035, Lafarge Construction Materials On. 0664168 in all sectors of the construction industry in the County of Brant and that portion of the Regional Municipality of Haldimand-Norfolk coming within the former County of Norfolk; the Regional Municipality of Waterloo (except that portion of the geographic Township of Beverly annexed by North Dumfries Township); the County of Wellington, excluding the industrial, commercial and institutional sector, save and except non-working foremen and persons above the rank of non-working foreman" (9 employees in unit)

Number of names of persons on revised voters' list	9
Number of persons who cast ballots	9
Number of ballots excluding segregated ballots cast by persons whose names appear on voter's list	7
Number of segregated ballots cast by persons whose names appear on voter's list	2
Number of spoiled ballots	1
Number of ballots marked in favour of applicant	1
Number of ballots marked against applicant	5
Number of ballots segregated and not counted	2

0573-97-R: International Union of Operating Engineers, Local 793 (Applicant) v. Lafarge Construction and/or Lafarge Construction 47035 and/or Lafarge Construction Materials (Respondent)

Unit: "all employees in the employ of Lafarge Construction and/or Lafarge Construction 47035 and/or Lafarge Construction Materials engaged in the operation of cranes, shovels, bulldozers and similar equipment and those primarily engaged in the repairing and maintaining of same, and employees engaged as surveyors in all sectors of the construction industry in the County of Brant and that portion of the Regional Municipality of Haldimand-Norfolk coming within the former County of Norfolk; the Regional Municipality of Waterloo (except that portion of the geographic Township of Beverly annexed by North Dumfries Township); the County of Wellington, excluding the industrial, commercial and institutional sector, save and except non-working foremen and persons above the rank of non-working foreman" (5 employees in unit)

Number of names of persons on revised voters' list	6
Number of persons who cast ballots	6
Number of ballots excluding segregated ballots cast by persons whose names appear on voter's list	4
Number of segregated ballots cast by persons whose names appear on voter's list	2
Number of ballots marked in favour of applicant	0
Number of ballots marked against applicant	4
Number of ballots segregated and not counted	2

0579-97-R: United Food and Commercial Workers International Union Local 175 (Applicant) v. Thrifty Canada Limited (Respondent)

Unit: "all shuttle bus drivers of Thrifty Canada Ltd., c.o.b. as Thrifty Car Rental employed at 6040 Indian Line in the City of Mississauga" (5 employees in unit)

Number of names of persons on revised voters' list	10
Number of persons who cast ballots	7

Number of ballots excluding segregated ballots cast by persons whose names appear on voter's list	7
Number of ballots marked in favour of applicant	3
Number of ballots marked against applicant	4

0685-97-R: Teamsters Local Union 91 (Applicant) v. Burgess Wholesale a division of Sobeys Inc. (Respondent)

Unit: "all employees of Burgess Wholesale Ltd. in the City of Kingston, save and except supervisors, persons above the rank of supervisor, sales, office and clerical staff" (30 employees in unit)

Number of names of persons on revised voters' list	46
Number of persons who cast ballots	46
Number of ballots excluding segregated ballots cast by persons whose names appear on voter's list	46
Number of spoiled ballots	1
Number of ballots marked in favour of applicant	11
Number of ballots marked against applicant	34

0701-97-R: Canadian Union of Public Employees (Applicant) v. Manitoulin Haven House Inc. (Respondent)

Unit: "all employees of Haven House Inc., save and except Supervisors, those above the rank of Supervisor, Bookkeeper and Payroll/ Administrative Assistant" (13 employees in unit)

Number of names of persons on revised voters' list	34
Number of persons who cast ballots	27
Number of ballots excluding segregated ballots cast by persons whose names appear on voter's list	24
Number of segregated ballots cast by persons whose names appear on voter's list	2
Number of segregated ballots cast by persons whose names do not appear on voters' list	1
Number of ballots marked in favour of applicant	8
Number of ballots marked against applicant	16
Number of ballots segregated and not counted	3

0739-97-R: Local 636 of The International Brotherhood of Electrical Workers (Applicant) v. The Hydro Electric Commission of the City of Brantford (Respondent)

Unit: "all office and clerical employees of The Hydro Electric Commission of the City of Brantford, save and except supervisors, persons above the rank of supervisor, secretaries to General Manager, Director/Administrator, Director of Engineering & Operations, Energy Management officer, Personnel & Benefits clerk and persons covered by existing collective agreements" (22 employees in unit)

Number of names of persons on revised voters' list	22
Number of persons who cast ballots	21
Number of ballots excluding segregated ballots cast by persons whose names appear on voter's list	21
Number of ballots marked in favour of applicant	10
Number of ballots marked against applicant	11

0749-97-R: Labourers' International Union of North America Local 183 (Applicant) v. Correia Enterprises Ltd. cob as Bee Clean (Respondent)

Unit: "all employees of Bee Clean employed at 1 Front Street West, Toronto, save and except non-working forepersons, persons above the rank of non-working foreperson, office and clerical staff" (11 employees in unit)

Number of names of persons on revised voters' list	14
Number of persons who cast ballots	12
Number of ballots excluding segregated ballots cast by persons whose names appear on voter's list	12
Number of ballots marked in favour of applicant	4

Number of ballots marked against applicant

8

0802-97-R: United Food and Commercial Workers International Union (Applicant) v. Brian's Custom Pro Mfg. Ltd. (Respondent)

Unit: "all employees of Brian's Custom Pro Manufacturing employed in the City of Kingsville, save and except the Plant Manager and Office Staff" (39 employees in unit)

Number of names of persons on revised voters' list	41
Number of persons who cast ballots	41
Number of ballots excluding segregated ballots cast by persons whose names appear on voter's list	39
Number of segregated ballots cast by persons whose names appear on voter's list	2
Number of ballots marked in favour of applicant	17
Number of ballots marked against applicant	22
Number of ballots segregated and not counted	2

Applications for Certification Withdrawn

1035-91-R: International Union of Bricklayers and Allied Craftmen Local 2, Ontario (Applicant) v. New City Bricklayers Ltd. (Respondent) v. International Union of Operating Engineers, Local 793, Labourers' International Union of North America, Local 183 (Intervenors) v. Group of Employees (Objectors) (*Terminated*)

2986-96-R: Ontario Laundry Driver's Union (O.L.D.) (Applicant) v. Work Wear Corporation of Canada, Ltd. A subsidiary of G & K Services Inc. (Respondent) v. Laundry and Linen Drivers and Industrial Workers Union, Teamsters Local 847, Affiliated with the International Brotherhood of Teamsters, Chauffeurs, Warehousemen and Helpers of America (Intervener)

4259-96-R: Millwrights Local 1410, United Brotherhood of Carpenters and Joiners of America (Applicant) v. General Electric Canada Inc. (Respondent)

4264-96-R: Canadian Union of Public Employees (Applicant) v. Hamilton Health Science Corporation (Respondent)

0425-97-R: Labourers' International Union of North America, Local 1089 (Applicant) v. Duron Ontario Limited (Respondent)

0562-97-R: International Brotherhood of Electrical Workers, Local 105 and International Brotherhood of Electrical Workers Construction Council of Ontario (Applicant) v. Marsh Instrumentation Inc. (Respondent)

0702-97-R: Carpenters and Allied Workers Local 27 United Brotherhood of Carpenters and Joiners of America (Applicant) v. Tibberton Developments Ltd. (Respondent)

0714-97-R: International Brotherhood of Painters & Allied Trades, Local 200 (Applicant) v. Canam Interiors Inc. (Respondent)

0762-97-R: Canadian Union of Public Employees (Applicant) v. The Wexford Inc. (Respondent) v. Christian Labour Association of Canada (Intervener)

0799-97-R: International Union of Operating Engineers, Local 793 (Applicant) v. Drexler Construction Limited (Respondent)

0808-97-R: United Association of Journeymen and Apprentices of the Plumbing and Pipefitting Industry of the United States and Canada, Local 46 (Applicant) v. Board of Education for the Borough of East York (Respondent)

0814-97-R: Drywall Acoustic Lathing and Insulation Local 675 of the United Brotherhood of Carpenters and Joiners of America (Applicant) v. Crystal Drywall Systems Ltd. (Respondent)

0891-97-R: Labourers' International Union of North America, Local 183 (Applicant) v. Deep Foundations Contractors (Respondent)

APPLICATION FOR COMBINATION OF BARGAINING UNITS

1326-95-R: Canadian Union of Public Employees Local 1370 (Applicant) v. Essex Health Care Centre (Respondent) (*Dismissed*)

FIRST AGREEMENT - DIRECTION

1910-96-FC: United Food & Commercial Workers International Union, Local 175/633 (Applicant) v. Birssa Holdings Inc. c.o.b. as East Side Mario's (Respondent) (*Granted*)

2360-96-FC: Service Employees Union Local 268 affiliated with the S.E.I.U., A.F. of L., C.I.O. and C.L.C. (Applicant) v. Fort William Clinic (Respondent) (*Granted*)

3271-96-FC: Teamsters Local Union No. 419 (Applicant) v. Leon's Furniture Limited (Respondent) (*Withdrawn*)

0801-97-FC: National Automobile, Aerospace, Transportation and General Workers Union of Canada (CAW-Canada) and its Local 124 (Applicant) v. Saturn Distributing Inc. (Respondent) (*Dismissed*)

APPLICATIONS FOR DECLARATION OF RELATED EMPLOYER

1026-90-R: Labourers' International Union Of North America, Local 1059 (Applicant) v. Branair Ltd. and Branair Mechanical Ltd. (Respondent) (*Terminated*)

4401-94-R: International Association of Bridge, Structural and Ornamental Iron Workers, Local 786 (Applicant) v. Northern Mine Erectors Ltd., Acadia Engineering Limited, Eagle Mining Contractors Inc., Ross Cudney, Canadian Structural & Mechanical Contracting Limited, Northern Millwright Constructors, 1074153 Ontario Limited c.o.b. as Eagle Mining Contractors Inc. (Respondents) (*Granted*)

3244-96-R: International Brotherhood of Painters and Allied Trades, Local Union 1891 (Applicant) v. G.M. Finishers Ltd. and Sunrise Contracting Ltd. (Respondents) (*Granted*)

0007-97-R: St. Joseph's General Hospital (Applicant) v. O.P.S.E.U. Local 733/734 (Respondent) (*Dismissed*)

0070-97-R: International Brotherhood of Electrical Workers, Local 586 (Applicant) v. 157498 Canada Inc. c.o.b. as Construction Promec, J.Y. Moreau Electric Inc. (Respondents) (*Withdrawn*)

0272-97-R: United Brotherhood of Carpenters and Joiners of America, Lake Ontario District Council (Applicant) v. 1138391 Ontario Limited, Mackie Automotive Systems Inc., Mackie Transport Limited and Mackie Moving Systems Corporation (Respondents) (*Granted*)

0557-97-R: The United Food and Commercial Workers' International Union, Local 175 & 633 (Applicant) v. Carewell Nursing Home Inc. and Manor Care Partners II c.o.b. as Friendly Manor (Respondents) (*Granted*)

SALE OF A BUSINESS

4401-94-R: International Association of Bridge, Structural and Ornamental Iron Workers, Local 786 (Applicant) v. Northern Mine Erectors Ltd., Acadia Engineering Limited, Eagle Mining Contractors Inc., Ross Cudney, Canadian Structural & Mechanical Contracting Limited, Northern Millwright Constructors, 1074153 Ontario Limited c.o.b. as Eagle Mining Contractors Inc. (Respondents) (*Granted*)

3244-96-R: International Brotherhood of Painters and Allied Trades, Local Union 1891 (Applicant) v. G.M. Finishers Ltd. and Sunrise Contracting Ltd. (Respondents) (*Granted*)

3497-96-R: MMP 101 Inc. (Applicant) v. National Automobile, Aerospace, Transportation and General Workers Union of Canada (CAW-Canada) Local 195 and Teamsters, Chauffeurs, Warehousemen, and Helpers Union Local 880 (Respondent) (*Granted*)

4002-96-R: United Food and Commercial Workers International Union, Local 175 (Applicant) v. Service Hospitalite Restaurant Management (Respondent) (*Withdrawn*)

0007-97-R: St. Joseph's General Hospital (Applicant) v. O.P.S.E.U. Local 733/734 (Respondent) (*Dismissed*)

0070-97-R: International Brotherhood of Electrical Workers, Local 586 (Applicant) v. 157498 Canada Inc. c.o.b. as Construction Promec, J.Y. Moreau Electric Inc. (Respondents) (*Withdrawn*)

0272-97-R: United Brotherhood of Carpenters and Joiners of America, Lake Ontario District Council (Applicant) v. 1138391 Ontario Limited, Mackie Automotive Systems Inc., Mackie Transport Limited and Mackie Moving Systems Corporation (Respondents) (*Granted*)

0557-97-R: The United Food and Commercial Workers' International Union, Local 175 & 633 (Applicant) v. Carewell Nursing Home Inc. and Manor Care Partners II c.o.b. as Friendly Manor (Respondents) (*Granted*)

APPLICATIONS FOR DECLARATION TERMINATING BARGAINING RIGHTS

2990-96-R: Sharon Coslett and Marnie MacMillan (Applicant) v. Service Employees Union, Local 268 Affiliated with the S.E.I.U., A.F. of L., C.I.O. and C.L.C. (Respondent) v. Fort William Clinic (Intervener) (*Dismissed*)

0156-97-R: Patrick Melville-Laborde (Applicant) v. Brewery, General and Professional Workers' Union (Respondent) v. DiverseyLever Canada, a Division of UL Canada Inc. (Equipment Division) (Intervener) (*Dismissed*)

0184-97-R: Lynda Olsen (Applicant) v. United Food and Commercial Workers International Union, Local 175 (Respondent) v. 1163133 Ontario Limited c.o.b. as Day's Inn, Owen Sound (Intervener)

Unit: "Bargaining Unit #1 all employees of 1163133 Ontario Limited c.o.b. as Day's Inn, Owen Sound in Owen Sound, save and except the Assistant Manager, office and clerical staff, persons regularly employed for not more than twenty-four hours per week and students employed during the school vacation period; and Bargaining Unit #2 all employees of 1163133 Ontario Limited c.o.b. as Day's Inn, Owen Sound, in Owen Sound, regularly employed for not more than 24 hours per week and students employed during the school vacation period, save and except the Assistant Manager and persons above the rank of Assistant Manager." (34 employees in unit) (*Granted*)

Number of names of persons on revised voters' list	34
Number of persons who cast ballots	17
Number of ballots excluding segregated ballots cast by persons whose names appear on voter's list	16
Number of segregated ballots cast by persons whose names appear on voter's list	1
Number of ballots marked in favour of respondent	5
Number of ballots marked against respondent	11
Number of ballots segregated and not counted	1

0291-97-R: John Kenney (Applicant) v. International Association of Machinists and Aerospace Workers, District Lodge #78, Local 235 (Respondent) v. Ontario Civil Service Credit Union Limited (Intervener)

Unit: "all employees of the Ontario Civil Service Credit Union Limited at 24 Wellesley Street West and after moving from 24 Wellesley Street West to 18 Granville Street in the Municipality of Metropolitan Toronto, save and except supervisors and persons above the rank of supervisor" (27 employees in unit) (*Granted*)

Number of names of persons on revised voters' list	27
Number of persons who cast ballots	26

Number of ballots excluding segregated ballots cast by persons whose names appear on voter's list	26
Number of spoiled ballots	0
Number of ballots marked in favour of respondent	11
Number of ballots marked against respondent	15
Number of ballots segregated and not counted	0

0346-97-R: Chris T. Usami and Bradley J. O'Leary (Applicant) v. International Union of Operating Engineers, Local 793 (Respondent) v. Ray-Gordon Equipment Limited (Intervener)

Unit: "all employees employed at and working out of Metropolitan Toronto, save and except non-working foremen, persons above the rank of non-working foreman, sales technicians, salesmen, office staff, clerks and parts department clerks and shippers" (8 employees in unit) (*Granted*)

Number of names of persons on revised voters' list	8
Number of persons who cast ballots	8
Number of spoiled ballots	0
Number of ballots marked in favour of respondent	3
Number of ballots marked against respondent	5

0385-97-R: Members of Teamsters Chemical, Energy and Allied Workers Union, Local No. 424 (Applicant) v. Teamsters Chemical, Energy and Allied Workers Union Local No. 424 (Respondent) v. Sun Chemical Limited (Intervener)

Unit: "employees employed at the Company plant, located at 125 Ormont Drive, Weston, Ontario, which unit was certified by the Ontario Labour Relations Board on March 6, 1957, and October 25, 1960 respectively, except for non-working foremen, persons above the rank of non-working foremen, and office and sales staff" (37 employees in unit) (*Dismissed*)

Number of names of persons on revised voters' list	37
Number of persons who cast ballots	36
Number of ballots excluding segregated ballots cast by persons whose names appear on voter's list	19
Number of segregated ballots cast by persons whose names appear on voter's list	17
Number of ballots marked in favour of respondent	17
Number of ballots marked against respondent	2
Number of ballots segregated and not counted	17

0500-97-R: The Barrie and District Association for People with Special Needs, Adult Day Services Program (Applicant) v. Christian Labour Association of Canada (Respondent) v. The Barrie & District Association for People with Special Needs (Intervener)

Unit: "all employees of The Barrie & District Association for People with Special Needs employed in the Adult Day Services program in the City of Barrie, save and except supervisors, persons above the rank of supervisor, office, clerical and administrative staff and senior instructor" (48 employees in unit) (*Granted*)

Number of names of persons on revised voters' list	50
Number of persons who cast ballots	44
Number of ballots excluding segregated ballots cast by persons whose names appear on voter's list	44
Number of ballots marked in favour of respondent	17
Number of ballots marked against respondent	27

0545-97-R: Susan Welsh (Applicant) v. The National Automobile, Aerospace, Transportation and General Workers Union of Canada (CAW Canada), Local 397 (Respondent)

Unit: "all employees of Cashway Building Centres Ltd. in the City of Brantford, save and except store manager, assistant store manager, yard foreperson and head cashier" (30 employees in unit) (*Granted*)

Number of names of persons on revised voters' list	31
Number of persons who cast ballots	23
Number of ballots excluding segregated ballots cast by persons whose names appear on voter's list	23
Number of spoiled ballots	1
Number of ballots marked in favour of respondent	7
Number of ballots marked against respondent	15

0589-97-R: Jan Delman and Vicki Page, on their behalf and on behalf of a group of employees of the Canadian Wildlife Federation (Applicant) v. United Steel Workers of America, Local 8327 (Respondent) v. Canadian Wildlife Federation (Intervener)

Unit: "all employees, save and except Supervisors, persons above the rank of Supervisor, Secretary to the Executive Vice-President and Secretary/Administrative Assistant to the General Manager" (28 employees in unit) (*Granted*)

Number of names of persons on revised voters' list	28
Number of persons who cast ballots	27
Number of ballots excluding segregated ballots cast by persons whose names appear on voter's list	27
Number of ballots marked in favour of respondent	9
Number of ballots marked against respondent	18

0683-97-R: Employees of Scott's Food Service c.o.b. K.F.C. (Applicant) v. Retail Wholesale Canada, Canadian Service Sector Division of the United Steelworkers of America, Local 448 (Respondent) v. Scott's Food Service (Intervener)

Unit: "the employer recognizes the United Steelworkers of America as the bargaining agent for all employees of Scott's Food Services Inc., A Division of Scott's Hospitality Inc. c.o.b. as K.F.C. at 2296 Eglinton Avenue West in the Municipality of Metropolitan Toronto, save and except assistant managers, persons above the rank of assistant managers, office and clerical staff and drivers" (13 employees in unit) (*Granted*)

Number of names of persons on revised voters' list	14
Number of persons who cast ballots	13
Number of ballots excluding segregated ballots cast by persons whose names appear on voter's list	13
Number of ballots marked in favour of respondent	0
Number of ballots marked against respondent	13

0779-97-R: Advocacy Resource Centre for the Handicapped (Applicant) v. Ontario Public Service Employees Union (Respondent) (*Granted*)

0804-97-R: Amlan (Tajai) Das (Applicant) v. Communications, Energy and Paperworkers Union of Canada (Respondent) v. The Responsive Marketing Group Inc. (Intervener)

Unit: "all employees of Responsive Marketing Group Inc. in the Municipality of Metropolitan Toronto, save and except supervisors, persons above the rank of supervisor, office and clerical staff" (47 employees in unit) (*Dismissed*)

Number of names of persons on revised voters' list	47
Number of persons who cast ballots	43
Number of ballots excluding segregated ballots cast by persons whose names appear on voter's list	41
Number of segregated ballots cast by persons whose names appear on voter's list	2
Number of spoiled ballots	1
Number of ballots marked in favour of respondent	21
Number of ballots marked against respondent	19
Number of ballots segregated and not counted	2

REFERRAL FROM MINISTER

2188-96-M: Retail, Wholesale Canada, Canadian Service Sector, Division of the United Steelworkers of America, Local 448 (Applicant) v. J.P. Murphy Inc. (Respondent) (*Withdrawn*)

APPLICATIONS FOR DECLARATION OF UNLAWFUL STRIKE

0653-97-U: Ronal Canada Inc. (Applicant) v. Robert Lohrke, Endre Gyurko and Ronald MacIntosh (Respondents) (*Dismissed*)

APPLICATIONS FOR DECLARATION OF UNLAWFUL LOCKOUT

0692-97-U: National Automobile, Aerospace, Transportation and General Workers Union of Canada (CAW-Canada) and its Local 1008 (Applicant) v. Vulcan Containers Ltd., and Vulcan Containers (Ontario) Ltd., Vulcan Packaging Inc. (Respondents) (*Dismissed*)

COMPLAINTS OF UNFAIR LABOUR PRACTICE

1308-95-U: Garry P. Lambert (Applicant) v. Teamsters, Chauffeurs, Warehousemen and Helpers Local Union No. 141 (Respondent) (*Dismissed*)

1358-95-U: Ontario Public Service Employees Union (Applicant) v. Ontario Ministry of Community & Social Services Information Systems Branch, Finance & Admin. System (Respondent) (*Withdrawn*)

1570-95-U: John Lively (Applicant) v. United Brotherhood of Carpenters and Joiners of America Local Union 1072 (Respondent) (*Withdrawn*)

2909-95-U: United Brotherhood of Carpenters and Joiners of America, Local 2000 (Applicant) v. Commonwealth Plywood Co. Ltd. (Respondent) (*Withdrawn*)

2934-95-U: J. Judge (Applicant) v. Ontario Public School Teachers Federation (Respondent) (*Dismissed*)

3510-95-U; 2359-96-U: Service Employees Union Local 268 affiliated with the S.E.I.U., A.F. of L., C.I.O. and C.L.C. (Applicant) v. Fort William Clinic (Respondent) (*Granted*)

0673-96-U; 0872-96-U: United Association of Journeymen and Apprentices of the Plumbing and Pipefitting Industry of the United States and Canada, Local 46 (Applicant) v. United Association of Journeymen of the Plumbing and Pipefitting Industry of the United States and Canada (Respondent) v. Mechanical Contractors Association of Ontario Zone 12 West, on behalf of itself and all of its members, specifically including Harold R. Stark, Division of William Stark Group Inc. (Intervener); United Association of Journeymen and Apprentices of the Plumbing and Pipefitting Industry of the United States and Canada and United Association of Journeymen and Apprentices of the Plumbing and Pipefitting Industry of the United States and Canada, Local 463 (Applicants) v. United Association of Journeymen and Apprentices of the Plumbing and Pipefitting Industry of the United States and Canada, Local 46, Mechanical Contractors Association - Ontario, Mechanical Contractors Association - Ontario (Respondents) (*Granted*)

0834-96-U: IBEW Construction Council of Ontario (Applicant) v. Pietro Electric Limited (Respondent) (*Granted*)

1228-96-U: Wilson Leung (Applicant) v. Hotel Employees Restaurant Employees Union Local 75 (Respondent) v. Toronto Airport Hilton International (Intervener) (*Terminated*)

1923-96-U; 1924-96-U: Peter Ralph (Applicant) v. United Association of Journeymen and Apprentices of the Plumbing and Pipe Fitting Industry of the United States and Canada, Local 221 (Respondent); Danial Rowatt (Applicant) v. United Association of Journeymen and Apprentices of the Plumbing and Pipe Fitting Industry of the United States and Canada, Local 221 (Respondent) (*Dismissed*)

1981-96-U: Barbara C. Stevens (Applicant) v. The Corporation of the Township of Alberton, Yves O. DeGagne, Judy Koski, Chane Rissman, Lucy Lahti and George Robinson (Respondent) (*Withdrawn*)

2085-96-U: Andre Langlois (Applicant) v. International Association of Machinists & Aerospace Workers, Local Lodge 1542 (Respondent) v. Boeing Canada (Intervener) (*Dismissed*)

2421-96-U: Ontario Public Service Employees Union (Applicant) v. Crown in Right of Ontario as represented by Ministry of Health (Respondent) (*Withdrawn*)

2859-96-U: Hospitality, Commercial and Service Employees Union, Local 73 chartered by Hotel Employees Restaurant Employees International Union (Applicant) v. Societa Italiana Di Benevolenza Principe Di Piemonte c.o.b. as the Da Vinci Centre (Respondent) (*Withdrawn*)

3185-96-U: Laundry and Linen Drivers and Industrial Workers Union, Local 847, Teamsters (Applicant) v. Work Wear Corporation of Canada Ltd. a subsidiary of G & K Services, Inc. (G & K Work Wear) (Respondent) (*Withdrawn*)

3270-96-U: Teamsters Local Union No. 419 (Applicant) v. Leon's Furniture Limited (Respondent) (*Withdrawn*)

3352-96-U: Brewery, General and Professional Workers' Union (Applicant) v. Brant County Community Legal Clinic (Respondent) (*Withdrawn*)

3541-96-U: Judith Manty Widmeyer (Applicant) v. Ontario Nurses' Association Local 126 and St. Joseph's General Hospital (Respondents) (*Withdrawn*)

3580-96-U: Jeff A. J. Reid (Applicant) v. Canadian Union of Public Employees, Local 576 and The Ottawa Civic Hospital (Respondents) (*Dismissed*)

3663-96-U; 3897-96-U: Douglas Leslie Roche et al. (Applicant) v. The Great Atlantic & Pacific Company of Canada Limited, Retail Wholesale Canada Canadian Service Sector of the United Steelworkers of America, Local 414, Kathwar Investments Ltd. c.o.b. as W&K Schell's Food Basics (Respondents); Douglas Leslie Roche et al (Applicant) v. Kathwar Investments Ltd. c.o.b. as W&K Schell's Food Basics (Respondent) v. The Great Atlantic & Pacific Company of Canada Limited, Retail Wholesale Canada, Canadian Service Sector Division of the United Steelworkers of America Local 414 (Interveners) (*Dismissed*)

3809-96-U; 3915-96-U; 3916-96-U: United Food & Commercial Workers International Union, Local 175 (Applicant) v. Smith's R. V. Centre (Respondent) (*Withdrawn*)

3841-96-U: International Association of Machinists and Aerospace Workers, Lodge 1547 (Applicant) v. Cannors Machinery Limited (Respondent) (*Withdrawn*)

3866-96-U: Canadian Union of Public Employees, Local 2219 (Applicant) v. Garson Nursing Home Ltd. (Respondent) (*Withdrawn*)

3944-96-U: Service Employees International Union, Local 204 (Applicant) v. Ukrainian Canadian Care Centre (Respondent) (*Withdrawn*)

3974-96-U: Dona Hunter Wallis (Applicant) v. Complx Tarxian, Communications, Energy and Paperworkers Union of Canada, L534 (Respondents) (*Withdrawn*)

3983-96-U: Teamster Local Union No. 419 (Applicant) v. Country Fresh Packaging Company Limited Division of Dominion Citrus & Drugs Ltd. (Respondent) (*Withdrawn*)

4050-96-U: Evelyn Brody (Applicant) v. Ontario Nurses' Association (Respondent) v. East York Health Unit (Intervener) (*Withdrawn*)

4107-96-U: United Food and Commercial Workers International Union, Local 175 & 633 (Applicant) v. Quinte Learning Centre Ltd. (Respondent) (*Withdrawn*)

4108-96-U: Hannah Gibson (Applicant) v. Ontario Public Service Employees' Union Local 597 (Respondent) v. Reena (Intervener) (*Dismissed*)

4152-96-U: Ontario Nurses' Association (Applicant) v. Mount Sinai Hospital (Respondent) (*Withdrawn*)

4250-96-U: Maria Lindo (Applicant) v. Service Employees International Union, Local 204 (Respondent) (*Withdrawn*)

4323-96-U: Barry Foley (Applicant) v. C.A.W. Union, Dan Williams, Leo Dineen, Chris Lawton, A.G. Simpson Co. Ltd., A.G. Simpson Co. Ltd. (Respondents) (*Withdrawn*)

0071-97-U: International Brotherhood of Electrical Workers, Local 586 (Applicant) v. 157498 Canada Inc. c.o.b. as Construction Promec, J.Y. Moreau Électrique Inc., Omya Canada Inc., Module Construction Inc. (Respondents) (*Withdrawn*)

0081-97-U: Service Employees International Union, Local 204 Affiliated with the S.E.I.U. A.F. of L., C.I.O., C.L.C. (Applicant) v. Paragon Health Care (Ontario) Inc. o/a Casa Verde Retirement Home (Respondent) (*Endorsed Settlement*)

0095-97-U: Canadian Union of Public Employees (Applicant) v. Hamilton Health Sciences Corporation (Respondent) v. Ontario Nurses' Association (Intervener) (*Withdrawn*)

0165-97-U: National Automobile, Aerospace, Transportation and General Workers Union of Canada (CAW-Canada) (Applicant) v. Pentalift Equipment Corporation (Respondent) (*Withdrawn*)

0172-97-U: Vincent E. Campbell (Applicant) v. (OPSEU) Ontario Public Service Employees Union (Respondent) (*Dismissed*)

0202-97-U: Communications, Energy and Paperworkers Union of Canada, Local 593 (Applicant) v. Petro-Canada Products Lake Ontario Refinery, Oakville Plant (Respondent) (*Dismissed*)

0212-97-U: Steve Idrovo (Applicant) v. Wayne Maslen (Respondent) (*Withdrawn*)

0222-97-U: Canadian Union of Operating Engineers and General Workers (Applicant) v. Brookfield Lepage Management Ltd. (Respondent) (*Withdrawn*)

0342-97-U: Nelson Fred Demers (Applicant) v. Labourer's Pension Fund of Central and Eastern Canada (Respondent) (*Dismissed*)

0376-97-U: Ontario Pipe Trades Council (Applicant) v. Jack Bird Plumbing & Heating Ltd. (Respondent) (*Withdrawn*)

0382-97-U: Frank Teti (Applicant) v. The Canada Council of Teamsters Local 938 (Respondent) (*Withdrawn*)

0558-97-U: Ruslan Guzha (Applicant) v. United Food and Commercial Workers International Union Local 351 (Respondent) (*Withdrawn*)

0559-97-U: Ontario Nurses' Association (Applicant) v. Hamilton Health Sciences Corporation (Respondent) (*Withdrawn*)

0621-97-U: Hollis Rosalle (Applicant) v. City of Toronto CUPE Local 43 (Respondent) (*Withdrawn*)

0628-97-U: Sun Chemical Limited (Applicant) v. Teamsters Chemical, Energy and Allied Workers Union, Local No. 424 (Respondent) (*Withdrawn*)

0691-97-U: National Automobile, Aerospace, Transportation and General Workers Union of Canada (CAW-Canada) and its Local 1008 (Applicant) v. Vulcan Containers Ltd. and Vulcan Containers (Ontario) Ltd., Vulcan Packaging Inc. (Respondents) (*Dismissed*)

0730-97-U: Teamsters Local Union 91 (Applicant) v. Burgess Wholesale Ltd. (Respondent) (*Withdrawn*)

0796-97-U: National Automobile, Aerospace, and Transportation and General Workers Union of Canada (CAW-Canada) and its Local 124 (Applicant) v. Saturn Distributing Inc. (Respondent) (*Dismissed*)

0857-97-U: George Peter (Applicant) v. Babcock & Wilcox (Respondent) (*Dismissed*)

0897-97-U: Carpenters and Allied Workers Local 27, United Brotherhood of Carpenters and Joiners of America (Applicant) v. Tibberton Developments Ltd. (Respondent) (*Withdrawn*)

0930-97-U: Karen Alaske, Violet Badger and Kathy Bender (Applicant) v. London & District Service Workers Union, Local 220 (Respondent) (*Dismissed*)

0938-97-U: Vickie Brooks (Applicant) v. Jim Roe Tenneco Canada (Respondent) (*Dismissed*)

0972-97-U: Syndicat canadien de la fonction publique Section Locale 3954 (Applicant) v. Service communautaires de Prescott et Russell (Respondent) (*Dismissed*)

0996-97-U: Marcia Robertson (Applicant) v. United Food and Commercial Workers' International Union, Local 114 P (Respondent) (*Dismissed*)

APPLICATION FOR INTERIM ORDER

0838-97-M: Retail Wholesale Canada, Canadian Service Sector Division of the United Steelworkers of America and Local 1688 The Ontario Taxi Union (Applicant) v. Associated Toronto Taxi-Cab Co-Operative Limited and The Co-Op Taxi Associates' Committee Representing Associates of Associated Toronto Taxi-Cab Co-operative Limited (Respondents) (*Endorsed Settlement*)

APPLICATIONS FOR CONSENT TO EARLY TERMINATION OF COLLECTIVE AGREEMENT

0652-97-M: Nemato Composites Inc. (Employer) v. International Association of Machinists and Aerospace Workers (Trade Union) (*Granted*)

0805-97-M: Laundry & Linen Drivers and Industrial Workers Union, Teamsters, Local 847 (Trade Union) v. Acan Windows Inc. (Employer) (*Granted*)

JURISDICTIONAL DISPUTES

0476-96-JD: Mechanical Contractors Association of Toronto on behalf of itself and all of its members, specifically including Bennett Mechanical Installations Limited (Applicants) v. The Ontario Pipe Trades Council of the United Association of Journeymen and Apprentices of the Plumbing and Pipe Fitting Industry of the United States and Canada, The United Association of Journeymen and Apprentices of the Plumbing and Pipe Fitting Industry of the United States and Canada, The United Association of Journeymen and Apprentices of the Plumbing and Pipe Fitting Industry of the United States and Canada, Local Union 463 (Respondents) v. Mechanical Contractors Association of Ontario, United Association of Journeymen and Apprentices of the Plumbing and Pipe Fitting Trade of the United States and Canada, Local 46, Metropolitan Plumbing and Heating Contractors' Association (Interveners) (*Granted*)

1495-96-JD: Iron Workers District Council of Ontario, International Association of Bridge, Structural and Ornamental Iron Workers, Local 786 (Applicant) v. Nicholls-Radtke Ltd. and Ontario Pipe Trades Council of the

United Association of Journeymen and Apprentices of the Plumbing and Pipefitting Industry of the United States and Canada and the United Association of Journeymen and Apprentices of the Plumbing and Pipefitting Industry of the United States and Canada, Locals 628 and 800 (Respondents) (*Granted*)

2945-96-JD: International Association of Bridge, Structural, Ornamental and Reinforcing Iron Workers International Association of Bridge, Structural, Ornamental and Reinforcing Iron Workers, Local 736 (Applicant) v. The Electrical Power Systems Construction Association, Ontario Hydro, International Brotherhood of Boilermakers, Iron Ship Builders, Blacksmiths, Forgers and Helpers, Local 128 (Respondents) (*Granted*)

3407-96-JD: Graphic Communications International Union, Local 100-M (Applicant) v. Carswell Manufacturing Division and Communications, Energy and Paperworkers' Union of Canada Local 91-0, Toronto Typographical Union (Respondents) (*Withdrawn*)

APPLICATIONS FOR DETERMINATION OF EMPLOYEE STATUS

3245-96-M: The Peterborough Typographical Union, Local 248 (Applicant) v. The Peterborough Examiner (Respondent) (*Withdrawn*)

4005-96-M: Canadian Union of Public Employees and its Local 3640 (Applicant) v. The Corporation of the Township of Oro-Medonte (Respondent) (*Withdrawn*)

COMPLAINTS UNDER THE OCCUPATIONAL HEALTH AND SAFETY ACT

2748-94-OH: Peter A. Dyer (Applicant) v. General Motors of Canada Ltd. (Respondent) (*Terminated*)

2488-95-OH: Steve Toker (Applicant) v. MAS (Whitby) Inc. (Respondent) (*Dismissed*)

0155-96-OH: Don Wade (Applicant) v. Hemlo Gold Mines Inc. (Respondent) (*Withdrawn*)

3148-96-OH: James Faught (Applicant) v. General Motors of Canada Limited (Respondent) (*Withdrawn*)

3149-96-OH: Brian Geddes & CAW Local 222 (Applicant) v. Dave English & Mario Russo, and General Motors of Canada Ltd. (Respondent) (*Withdrawn*)

3240-96-OH: John (Jack) Thomas Wayne Bell (Applicant) v. Dingwell's Machinery and Supply, Canadian Wearparts, Ted Wheel, Tim House, Mark Dixon (Respondents) (*Withdrawn*)

3363-96-OH: Abdulghani Abdo (Applicant) v. Doorhandle Systems Ventra Group Inc. (Respondent) (*Withdrawn*)

3691-96-OH: Latchman Ramoutar (Applicant) v. Duct Cleaning by Global Ltd. (Respondent) (*Endorsed Settlement*)

3698-96-OH: Biswajit Maraj (Applicant) v. Duct Cleaning by Global Ltd. (Respondent) (*Endorsed Settlement*)

4266-96-OH: Stanley Balner (Applicant) v. Master Halco Inc. (Respondent) (*Withdrawn*)

0174-97-OH: Kim Heise (Applicant) v. Ian Ganson Gunn Metal Stampings Inc. (Respondent) (*Withdrawn*)

0211-97-OH: Mark J. Mager (Applicant) v. Morphy Containers Ltd. (Respondent) (*Withdrawn*)

0596-97-OH: William (Bill) Bainton (Applicant) v. Associated Paving Company Ltd. (Respondent) (*Withdrawn*)

0665-97-OH: Wendy Johnston (Applicant) v. Jeff Jarmin (Respondent) (*Withdrawn*)

0696-97-OH: Robert A. McWhinnie (Applicant) v. Kidd Creek Met Site (Respondent) (*Dismissed*)

CONSTRUCTION INDUSTRY GRIEVANCES

3670-95-G; 0475-96-G: United Association of the Journeymen and Apprentices of the Plumbing and Pipe Fitting Industry of the United States and Canada, Local 46 (Applicant) v. Harold R. Stark, Division of William Stark Group Inc. (Respondent); Mechanical Contractors Association of Toronto on behalf of itself and all of its members specifically including, Bennett Mechanical Installations Ltd. (Applicants) v. The Ontario Pipe Trades Council of the United Association of Journeymen and Apprentices of the Plumbing and Pipe Fitting Industry of the United States and Canada, The United association of Journeymen and Apprentices of the Plumbing and Pipe Fitting Industry of the United States and Canada (Respondents) (*Granted*)

0190-96-G; 2004-96-G: United Association of Journeymen and Apprentices of the Plumbing and Pipefitting Industry of the United States and Canada, Local Union 46 (Applicant) v. University Plumbing & Heating Ltd. (Respondent) (*Endorsed Settlement*)

1859-96-G: Carpenters & Allied Workers Local 27, United Brotherhood of Carpenters and Joiners of America (Applicant) v. Rockford Tile Contractors Limited; Rockford Tile Contractors 1996 Limited (Respondent) (*Granted*)

1888-96-G: Quality Control Council of Canada (Applicant) v. Protech Industrial Group Inc. (Respondent) (*Withdrawn*)

2745-96-G: International Brotherhood of Painters and Allied Trades, Local 1819 (Applicant) v. United Shelters Limited, carrying on business under the firm name and style as Lisgar Construction Company (Respondent) (*Granted*)

3351-96-G: Labourers' International Union of North America Local 183 (Applicant) v. P.S. Carpentry Co. Ltd. (Respondent) (*Terminated*)

3364-96-G: United Association of Journeymen and Apprentices of the Plumbing and Pipefitting Industry of the United States and Canada, Local 787 (Applicant) v. Honeywell Limited (Respondent) (*Granted*)

3365-96-G; 3366-96-G: United Association of Journeymen and Apprentices of the Plumbing and Pipefitting Industry of the United States and Canada, Local 787 (Applicant) v. Honeywell Limited (Respondent) (*Dismissed*)

3368-96-G: United Association of Journeymen and Apprentices of the Plumbing and Pipefitting Industry of the United States and Canada, Local 787 (Applicant) v. Sutherland-Schultz Inc. (Respondent) (*Withdrawn*)

3978-96-G; 3979-96-G; 4042-96-G: International Union of Operating Engineers, Local 793 (Applicant) v. Bot Construction (Canada) Limited/Clarkson Construction Company Limited (Respondent) (*Withdrawn*)

0069-97-G: International Brotherhood of Electrical Workers, Local 586 (Applicant) v. 157498 Canada Inc. c.o.b. as Construction Promec, J.Y. Moreau Électrique Inc. (Respondents) (*Withdrawn*)

0074-97-G: United Association of Journeymen and Apprentices of the Plumbing and Pipefitting Industry of the United States and Canada, Local Union 46 (Applicant) v. University Plumbing & Heating Ltd. (Respondent) (*Withdrawn*)

0170-97-G: Millwrights District Council of Ontario and its Local 1244 (Applicant) v. Dutchman Interior Stripping Inc. (Respondent) (*Granted*)

0271-97-G: United Brotherhood of Carpenters and Joiners of America, Lake Ontario District Council (Applicant) v. 1138391 Ontario Limited, Mackie Automotive Systems Inc., Mackie Transport Limited and Mackie Moving Systems Corporation (Respondents) (*Withdrawn*)

0344-97-G: Labourers' International Union of North America Local 183 (Applicant) v. Normen Star Masonry (Respondent) (*Endorsed Settlement*)

0378-97-G: Ontario Pipe Trades Council (Applicant) v. Jack Bird Plumbing & Heating Ltd. (Respondent) (*Withdrawn*)

0392-97-G; 0393-97-G: Drywall Acoustic Lathing and Insulation Local 675 of the United Brotherhood of Carpenters and Joiners of America (Applicant) v. Castro's Investors and Builders Limited (Respondent) (*Endorsed Settlement*)

0423-97-G: International Brotherhood of Electrical Workers, Local 520 (Applicant) v. C & C Enterprises Electrical Construction Limited (Respondent) (*Withdrawn*)

0446-97-G: Labourers' International Union of North America, Local 183 (Applicant) v. Accaroc Construction Ltd. (Respondent) (*Granted*)

0474-97-G: International Union of Elevator Constructors, Local 50 (Applicant) v. Otis Canada Inc. (Respondent) (*Withdrawn*)

0618-97-G: Labourers' International Union of North America, Local 1059 (Applicant) v. Quality Masonry (Respondent) (*Endorsed Settlement*)

0619-97-G: International Union of Bricklayers and Allied Craftsmen, Local 5 (Applicant) v. Quality Masonry (Respondent) (*Endorsed Settlement*)

0629-97-G: International Brotherhood of Electrical Workers, Local 353 (Applicant) v. Stacey Electric Company Limited (Respondent) (*Withdrawn*)

0650-97-G: The United Association of Journeymen and Apprentices of the Plumbing and Pipe Fitting Industry of the United States and Canada, Local 67 (Applicant) v. Global Mechanical Ltd. (Respondent) (*Terminated*)

0664-97-G: United Association of Journeymen and Apprentices of the Plumbing and Pipefitting Industry of the United States and Canada, Local Union 67 (Applicant) v. Blenkhorn - Sayers, a division of Sayers and Associates Limited (Respondent) (*Withdrawn*)

0676-97-G: The Ontario Council of the International Brotherhood of Painters and Allied Trades, Local 1904 (Applicant) v. C.H. Heist Ltd. (Respondent) (*Withdrawn*)

0677-97-G: Labourers' International Union of North America, Local 506 (Applicant) v. Duron Ontario Ltd. (Respondent) (*Withdrawn*)

0679-97-G: Operative Plasterers' and Cement Masons' International Association of the United States and Canada, Local 598 (Applicant) v. 975575 Ontario Limited c.o.b. Blandford Industrial Insulation (Respondent) (*Endorsed Settlement*)

0682-97-G: International Union of Operating Engineers and its Local 793 (Applicant) v. Cliffside Contractors, Division of the Foundation Company of Canada o/a Cliffside Utility Contractors (Respondent) (*Withdrawn*)

0693-97-G: United Association of Journeymen and Apprentices of the Plumbing and Pipefitting Industry of the United States and Canada, Local 787 (Applicant) v. Westaire Air Conditioning & Heating Ltd. (Respondent) (*Withdrawn*)

0731-97-G: International Association of Bridge, Structural, Ornamental and Reinforcing Iron Workers, Local 721 (Applicant) v. Torsteel Co. Ltd. (Respondent) (*Withdrawn*)

0795-97-G: International Brotherhood of Electrical Workers, Local 353 (Applicant) v. Davis-Young Electrical Inc. (Respondent) (*Withdrawn*)

0829-97-G: United Brotherhood of Carpenters and Joiners of America, Local 2041 (Applicant) v. 1142469 Ontario Limited c.o.b. as Eastec (Respondent) (*Endorsed Settlement*)

0846-97-G: United Brotherhood of Carpenters and Joiners of America, Local 1669 (Applicant) v. P.S.P. Erectors Inc., Scaffold Connection (Respondents) (*Withdrawn*)

0937-97-G: International Brotherhood of Painters and Allied Trades, District Council 46 (Applicant) v. Atlantida Painting & Decorating (Respondent) (*Withdrawn*)

0980-97-G: International Brotherhood of Electrical Workers Local Union 353 (Applicant) v. Power Cable Installations (Toronto) Limited (Respondent) (*Withdrawn*)

0981-97-G: International Brotherhood of Electrical Workers Local Union 353 (Applicant) v. T.P. Electric A Division of Tony Presutti Electric Limited (Respondent) (*Withdrawn*)

0982-97-G: International Brotherhood of Electrical Workers Local Union 353 (Applicant) v. P.M.C. Power Management Corporation (Respondent) (*Granted*)

MINISTERIAL REFERENCE (SEC. 3(2)) HLDAA

1709-96-U: Bellwoods Centre for Community Living Inc. (Applicant) v. Service Employees International Union, Local 204 (Respondent) (*Granted*)

APPLICATIONS FOR RECONSIDERATION OF BOARD'S DECISION

1345-95-U; 1407-95-U: Tricia Monsegue (Applicant) v. Ontario Public Service Employees Union and The Crown in Right of Ontario as represented by the Ministry of Agriculture, Food and Rural Affairs (Respondents); Kam Sidhu (Applicant) v. Ontario Public Service Employees Union and The Crown in Right of Ontario as represented by the Ministry of Agriculture, Food and Rural Affairs, Management Board Secretariat (Respondents) (*Dismissed*)

3488-95-OH: John Sellers, Mario Romagnuolo, Gerald Pelley and CAW Local 222 (Applicant) v. Robert Taylor, Don Sawyer and General Motors of Canada Limited (Respondents) (*Dismissed*)

1937-96-OH: Carolyn M. Davis (Applicant) v. Thomas Allen & Son Ltd. and Larry White (Respondent) (*Dismissed*)

2239-96-U: Don Brunelle, Randy Donaldson, Ken Vandelinder, Floyd Taylor, Frank Schwartz, Greg Fevreau (Applicant) v. National Automobile, Aerospace, Transportation and General Workers Union of Canada (CAW-Canada) and its Local 444 (Respondent) v. Chrysler Canada Ltd. (Intervener) (*Dismissed*)

3113-96-U: Martin J. Collins (Applicant) v. Hotel Employees Restaurant Employees Union, Local 75 (Respondent) (*Dismissed*)

3854-96-U: National Automobile, Aerospace, Transportation and General Workers Union of Canada (CAW-Canada) and its Local 35 (Applicant) v. Siemens Electric Limited (Respondent) (*Denied*)

0015-97-U: David Gazit (Applicant) v. Ontario Public Service Employees Union (Respondent) v. George Brown College (Intervener) (*Denied*)

0161-97-R: 1025963 Ontario Inc. c.o.b. as Union Taxi (Applicant) v. Retail Wholesale Canada, Canadian Service Sector Division of the United Steelworkers Local 1688 (Respondent) (*Dismissed*)

0282-97-R: Carpenters and Allied workers Local 27 United Brotherhood of Carpenters and Joiners of America (Applicant) v. Northam Development Corporation and/or Northam Construction Corp. (Respondent) (*Dismissed*)

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APPLICATIONS DISPOSED OF BY THE ONTARIO LABOUR RELATIONS BOARD DURING JULY 1997

APPLICATIONS FOR CERTIFICATION

Bargaining Agents Certified Subsequent to Vote

0488-95-R: Labourers' International Union of North America, Local 527 (Applicant) v. Construction Gasperino Di Iorio Inc. (Respondent) v. United Brotherhood of Carpenters and Joiners of America, Local 93 (Intervener)

Unit: "all working foremen, carpenters, and carpenters' apprentices in the employ of Construction Gasperino Di Iorio Inc. save and except those covered by the Carpenter's Provincial Agreement for the Industrial, Commercial and Institutional sector of the construction industry and Owner-Builder residential wood-frame construction in the Regional Municipality of Ottawa-Carleton (Except the Township of Marlborough) the County of Russell and the Townships of Alfred and North South Plantagenet in the County of Prescott, and the Counties of Stormont and Glengarry and surrounding townships as follows: Williamsburg, Winchester, East Hawkesbury, West Hawkesbury, Longueuil and Caledonia, and Renfrew County save and except the Township of McNab, the following townships in the District of Nipissing, Ballantyne, Wilkes, Pentland, Boyd, Cameron, Paxton, Biggar, Osler, Lister, Deacon, Fitzgerald, Butt, Devine, Bishop, Freswick, Anglin, White, Edgar, McCraney, Hunter, McLaughlin, Bower, Kickson, Niven, Barron, Bronson, Stratton, Finlayson, Pick, Canisbay, Sproule, Preston, Clancy, Guthrie, Mater, Airy, Murchison, Dickens, Sabine and Lyell" (14 employees in unit)

Number of names of persons on revised voters' list	4
Number of persons who cast ballots	4
Number of ballots marked in favour of applicant	3
Number of ballots marked in favour of intervener	1

1225-96-R: Ontario Nurses' Association (Applicant) v. Mount Sinai Hospital (Respondent)

Unit: "all registered and graduate nurses of Mount Sinai Hospital in the Municipality of Metropolitan Toronto, engaged in nursing care, save and except Nursing Unit Administrators and Assistant Supervisors, persons above the rank of Nursing Unit Administrator and Assistant Supervisor, and persons regularly employed for more than twenty-four hours per week" (256 employees in unit)

Number of names of persons on revised voters' list	253
Number of persons who cast ballots	97
Number of ballots excluding segregated ballots cast by persons whose names appear on voter's list	89
Number of segregated ballots cast by persons whose names appear on voter's list	4
Number of segregated ballots cast by persons whose names do not appear on voters' list	4
Number of ballots marked in favour of applicant	70
Number of ballots marked against applicant	23
Number of ballots segregated and not counted	4

2931-96-R: International Association of Bridge, Structural and Ornamental Iron Workers, Local 721 (Applicant) v. The Board of Education for the City of Toronto (Respondent) v. Canadian Union of Public Employees, Local 134 (Intervener)

Unit: "all ironworkers and ironworkers' apprentices in the employ of The Board of Education for the City of Toronto in the industrial, commercial and institutional sector of the construction industry in the Province of Ontario, and all ironworkers and ironworkers' apprentices in the employ of The Board of Education for the City of Toronto in all sectors of the construction industry in the Municipality of Metropolitan Toronto, the Regional Municipalities of Peel and York, the Towns of Oakville and Halton Hills and that portion of the Town of Milton within the geographic Townships of Esquesing and Trafalgar, and the Towns of Ajax and Pickering in the Regional

Municipality of Durham, excluding the industrial, commercial and institutional sector, save and except non-working foremen and persons above the rank of non-working foreman” (19 employees in unit) (Clarity Note)

Number of names of persons on revised voters' list	21
Number of persons who cast ballots	18
Number of ballots excluding segregated ballots cast by persons whose names appear on voter's list	17
Number of segregated ballots cast by persons whose names appear on voter's list	1
Number of spoiled ballots	1
Number of ballots marked in favour of applicant	16
Number of ballots segregated and not counted	1

2968-96-R: The United Association of Journeymen and Apprentices of the Plumbing and Pipe Fitting Industry of the United States and Canada, Local Union 46 (Applicant) v. The Board of Education for the City of Toronto (Respondent) v. Canadian Union of Public Employees, Local 134 (Intervener)

Unit: “all plumbers, plumbers’ apprentices, steamfitters and steamfitters’ apprentices in the employ of The Board of Education for the City of Toronto in the industrial, commercial and institutional sector of the construction industry in the Province of Ontario, and all plumbers, plumbers’ apprentices, steamfitters, steamfitters’ apprentices in the employ of The Board of Education for the City of Toronto in all sectors of the construction industry in the Municipality of Metropolitan Toronto, the Regional Municipalities of Peel and York, the Towns of Oakville and Halton Hills and that portion of the Town of Milton within the geographic Townships of Esquesing and Trafalgar, and the Towns of Ajax and Pickering in the Regional Municipality of Durham, excluding the industrial, commercial and institutional sector, save and except non- working foremen and persons above the rank of non-working foreman” (61 employees in unit) (*Clarity Note*)

Number of names of persons on revised voters' list	61
Number of persons who cast ballots	47
Number of ballots excluding segregated ballots cast by persons whose names appear on voter's list	47
Number of ballots marked in favour of applicant	44
Number of ballots marked against applicant	3

3280-96-R: Service Employees Union Local 268 affiliated with the S.E.I.U., A.F. of L., C.I.O. and C.L.C. (Applicant) v. Comcare (Canada) Limited (Respondent)

Unit: “all employees of Comcare (Canada) Limited in the City of Thunder Bay, save and except supervisors, persons above the rank of supervisor, and office and clerical staff” (105 employees in unit)

Number of names of persons on revised voters' list	116
Number of persons who cast ballots	114
Number of ballots excluding segregated ballots cast by persons whose names appear on voter's list	107
Number of segregated ballots cast by persons whose names appear on voter's list	0
Number of ballots marked in favour of applicant	60
Number of ballots marked against applicant	54

3370-96-R: Canadian Union of Professional Security-Guards (Applicant) v. Provincial Security Services Ltd. (Respondent)

Unit: “all employees of Provincial Security Services Ltd. employed as security guards at Bell Mobility, 2920 Matheson Blvd., in the City of Mississauga, save and except supervisors and persons above the rank of supervisor” (11 employees in unit) (*Having regard to the agreement of the parties*)

Number of names of persons on revised voters' list	11
Number of persons who cast ballots	10
Number of ballots excluding segregated ballots cast by persons whose names appear on voter's list	9
Number of segregated ballots cast by persons whose names appear on voter's list	1

Number of segregated ballots cast by persons whose names do not appear on voters' list	0
Number of spoiled ballots	0
Number of ballots marked in favour of applicant	9
Number of ballots marked against applicant	0
Number of ballots segregated and not counted	1

3949-96-R: Teamsters Local Union No. 230, Ready Mix, Building Supply, Hydro & Construction Drivers, Affiliated with the International Brotherhood of Teamsters (Applicant) v. Mibro Partners and Kimbrox Packaging Limited (Respondent)

Unit #1: "all employees of Mibro Partners in the Municipality of Metropolitan Toronto, save and except supervisors, persons above the rank of supervisor, office, clerical, sales staff and students employed for the school vacation period" (27 employees in unit) (*Having regard to the agreement of the parties*)

Number of names of persons on revised voters' list	27
Number of persons who cast ballots	27
Number of ballots excluding segregated ballots cast by persons whose names appear on voter's list	27
Number of spoiled ballots	1
Number of ballots marked in favour of applicant	18
Number of ballots marked against applicant	8

Unit #2: "all employees of Kimbrox Packaging Limited in the Municipality of Metropolitan Toronto, save and except supervisor, office, clerical, sales staff and students employed for the school vacation period" (27 employees in unit) (*Having regard to the agreement of the parties*)

Number of names of persons on revised voters' list	27
Number of persons who cast ballots	27
Number of ballots excluding segregated ballots cast by persons whose names appear on voter's list	27
Number of spoiled ballots	1
Number of ballots marked in favour of applicant	18
Number of ballots marked against applicant	8

4343-96-R: International Brotherhood of Electrical Workers, Local 353 (Applicant) v. The Board of Education for the City of North York (Respondent) v. The United Brotherhood of Carpenters and Joiners of America, Local 3219 (Intervener)

Unit: "all electricians and electricians' apprentices in the employ of The Board of Education for the City of North York, in the industrial, commercial and institutional sector of the construction industry in the Province of Ontario, and all electricians and electricians' apprentices in the employ of The Board of Education for the City of North York in all sectors of the construction industry in the Municipality of Metropolitan Toronto, the Regional Municipalities of Peel and York, the Towns of Oakville and Halton Hills and that portion of the Town of Milton within the geographic Townships of Esquesing and Trafalgar, and the Towns of Ajax and Pickering in the Regional Municipality of Durham, excluding the industrial, commercial and institutional sector, save and except non-working foremen and persons above the rank of non-working foreman" (39 employees in unit)

Number of names of persons on revised voters' list	40
Number of persons who cast ballots	39
Number of ballots excluding segregated ballots cast by persons whose names appear on voter's list	39
Number of ballots marked in favour of applicant	37
Number of ballots marked against applicant	2

0012-97-R: International Brotherhood of Electrical Workers, Local 353 (Applicant) v. The Board of Education for the Borough of East York (Respondent) v. United Brotherhood of Carpenters and Joiners of America, Local 3219 (Intervener)

Unit: "all journeymen electricians and electricians' apprentices in the employ of The Board of Education for the Borough of East York in the industrial, commercial and institutional sector of the construction industry in the Province of Ontario, and all journeymen electricians and electricians' apprentices in the employ of The Board of Education for the Borough of East York in all sectors of the construction industry in the Municipality of Metropolitan Toronto, the Regional Municipalities of Peel and York, the Towns of Oakville and Halton Hills and that portion of the Town of Milton within the geographic Townships of Esquesing and Trafalgar, and the Towns of Ajax and Pickering in the Regional Municipality of Durham, excluding the industrial, commercial and institutional sector, save and except non-working foremen and persons above the rank of non-working foreman" (2 employees in unit)

Number of names of persons on revised voters' list	2
Number of persons who cast ballots	2
Number of ballots marked in favour of applicant	2
Number of ballots marked against applicant	0

0486-97-R: United Steelworkers of America (Applicant) v. Hawthorne Security & Communications Inc. (Respondent)

Unit: "all security guards employed by Hawthorne Security & Commissions Inc. in the City of Kingston, the Township of Ernestown and the separated town of Gananoque, save and except Site Supervisor, persons above the rank of Site Supervisor, Office and Clerical Staff" (20 employees in unit) (*Having regard to the agreement of the parties*)

Number of names of persons on revised voters' list	23
Number of persons who cast ballots	16
Number of ballots excluding segregated ballots cast by persons whose names appear on voter's list	14
Number of segregated ballots cast by persons whose names appear on voter's list	2
Number of spoiled ballots	1
Number of ballots marked in favour of applicant	7
Number of ballots marked against applicant	6
Number of ballots segregated and not counted	2

0541-97-R: Ontario Secondary School Teachers' Federation (Applicant) v. Ottawa Board of Education (Respondent)

Unit: "all employees of the Ottawa Board of Education, save and except persons employed in positions attached as Appendix B and persons for whom any trade union held bargaining rights as of May 12, 1997, the application date" (158 employees in unit) (*Having regard to the agreement of the parties*)

Number of names of persons on revised voters' list	158
Number of persons who cast ballots	112
Number of spoiled ballots	0
Number of ballots marked in favour of applicant	66
Number of ballots marked against applicant	9
Number of ballots segregated and not counted	37

0674-97-R: United Steelworkers of America (Applicant) v. Canadian Waste Services Inc. (Respondent)

Unit: "all employees of Canadian Waste Services Inc. in the Town of Richmond Hill, save and except supervisors, persons above the rank of supervisor, dispatcher, office and sales staff" (28 employees in unit) (*Having regard to the agreement of the parties*)

Number of names of persons on revised voters' list	28
Number of persons who cast ballots	23
Number of ballots excluding segregated ballots cast by persons whose names appear on voter's list	23
Number of ballots marked in favour of applicant	20
Number of ballots marked against applicant	3

0786-97-R: Hotel Employees Restaurant Employees Union, Local 75 (Applicant) v. Palavriion, Richtree Markets Inc. (Respondent)

Unit: "all employees of Palavriion, Richtree Markets Inc. located at 270 Front Street West, in the City of Toronto, Ontario, save and except the general manager, persons above the rank of general manager, restaurant manager, assistant restaurant manager, executive chef, management trainees, office, sales and clerical employees, maintenance engineer and first sous chef" (50 employees in unit) (*Having regard to the agreement of the parties*)

Number of names of persons on revised voters' list	56
Number of persons who cast ballots	33
Number of ballots excluding segregated ballots cast by persons whose names appear on voter's list	32
Number of segregated ballots cast by persons whose names do not appear on voters' list	1
Number of ballots marked in favour of applicant	30
Number of ballots marked against applicant	2

0788-97-R: Ontario Secondary School Teachers' Federation (Applicant) v. The Board of Education for the City of Hamilton (Respondent)

Unit: "all employees of The Board of Education for the City of Hamilton employed as English as a Second Language instructors, save and except supervisors, persons above the rank of supervisor and any employees covered by a collective agreement as of June 3, 1997" (27 employees in unit)

Number of names of persons on revised voters' list	28
Number of persons who cast ballots	19
Number of ballots, excluding segregated ballots, cast by persons whose names appear on voters' list	19
Number of ballots marked in favour of applicant	14
Number of ballots marked against applicant	5

0873-97-R: Ontario Secondary School Teachers' Federation (Applicant) v. Prescott-Russell County Board of Education (Respondent)

Unit: "all teaching support staff employed by the Prescott-Russell County Board of Education in the Province of Ontario, save and except supervisors and persons above the rank of supervisor" (46 employees in unit) (*Having regard to the agreement of the parties*) (*Clarity Note*)

Number of names of persons on revised voters' list	46
Number of persons who cast ballots	42
Number of ballots excluding segregated ballots cast by persons whose names appear on voter's list	41
Number of segregated ballots cast by persons whose names do not appear on voters' list	1
Number of ballots marked in favour of applicant	41
Number of ballots marked against applicant	0
Number of ballots segregated and not counted	1

0877-97-R: Service Employees Union Local 268 affiliated with the S.E.I.U., A.F. of L., C.I.O. and C.L.C. (Applicant) v. Thunder Bay District Placement Coordination Service (Respondent)

Unit: "all office and clerical employees of Thunder Bay District Placement Coordination Service in the City of Thunder Bay, save and except supervisors, persons above the rank of supervisor and persons in bargaining units for which any trade union held bargaining rights as of June 11, 1997" (3 employees in unit) (*Having regard to the agreement of the parties*)

Number of names of persons on revised voters' list	3
Number of persons who cast ballots	3
Number of ballots excluding segregated ballots cast by persons whose names appear on voter's list	3
Number of ballots marked in favour of applicant	3

Number of ballots marked against applicant	0
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0884-97-R: National Automobile, Aerospace, Transportation and General Workers Union of Canada (CAW-Canada) (Applicant) v. Con Cast Pipe (Respondent)

Unit: "all employees of Con Cast Pipe in the City of Guelph, save and except forepersons, persons above the rank of foreperson, office and clerical staff and persons regularly employed for not more than 24 hours per week" (92 employees in unit) (*Having regard to the agreement of the parties*)

Number of names of persons on revised voters' list	93
Number of persons who cast ballots	88
Number of ballots excluding segregated ballots cast by persons whose names appear on voter's list	88
Number of ballots marked in favour of applicant	46
Number of ballots marked against applicant	42

0885-97-R: Ontario Nurses' Association (Applicant) v. Thunder Bay District Placement Coordination Service (Respondent)

Unit: "all case coordinators employed by the Thunder Bay District Placement Coordination Service, save and except the Director and persons above the rank of Director" (2 employees in unit) (*Having regard to the agreement of the parties*)

Number of names of persons on revised voters' list	2
Number of persons who cast ballots	2
Number of ballots excluding segregated ballots cast by persons whose names appear on voter's list	2
Number of ballots marked in favour of applicant	
Number of ballots marked against applicant	0

0887-97-R: United Food and Commercial Workers International Union, Local 175 (Applicant) v. Mobile Climate Control Inc. (Respondent)

Unit: "all employees of Mobile Climate Control Inc. in the City of Metropolitan Toronto, save and except supervisors and those above the rank of supervisor, office, clerical, sales staff, persons regularly employed for not more than 24 hours per week, students employed during the school vacation period" (70 employees in unit) (*Having regard to the agreement of the parties*)

Number of names of persons on revised voters' list	86
Number of persons who cast ballots	82
Number of ballots excluding segregated ballots cast by persons whose names appear on voter's list	65
Number of segregated ballots cast by persons whose names appear on voter's list	17
Number of spoiled ballots	1
Number of ballots marked in favour of applicant	39
Number of ballots marked against applicant	26
Number of ballots segregated and not counted	16

0888-97-R: Office and Professional Employees International Union (Applicant) v. Home Care Program for Metropolitan Toronto Incorporated (Respondent)

Unit: "all casual and temporary employees employed by the Home and Care Program for Metropolitan Toronto in the Municipality of Metropolitan Toronto, save and except supervisors, persons above the rank of supervisor, senior secretary (Executive Director), intermediate accounting clerk accounts payable (Payroll), students employed during the school vacation period and persons in bargaining units for which any trade union held bargaining rights as of June 11, 1997" (112 employees in unit) (*Having regard to the agreement of the parties*)

Number of names of persons on revised voters' list	135
Number of persons who cast ballots	41

Number of ballots excluding segregated ballots cast by persons whose names appear on voter's list	41
Number of ballots marked in favour of applicant	37
Number of ballots marked against applicant	4

0918-97-R: Canadian Union of Public Employees (Applicant) v. Résidence Saint-Louis (Respondent)

Unit: "all employees of Résidence Saint-Louis in Orleans, Ontario, save and except Professional Medical Staff, Registered and Graduate Nurses, Professional Staff, Technical Personnel, Office and Clerical staff, Supervisors, Foremen, persons above the rank of Foreman, Plant Manager and Assistant Plant Manager and any persons for whom a trade union held bargaining rights on the date of application"; "tous les employés laïcs de la Résidence Saint-Louis à Orleans, Ontario à l'exception des employés professionnels médicaux, infirmières autorisées, infirmières graduées, personnel professionnel, personnel technique, personnel clérical et de bureau, surveillants, contremaîtres, personne équivalente ou supérieure au poste de surveillant, gérant et assistant gérant de l'installation matérielle et des personnes pour lesquelles un syndicat détenait un droit de négocier en date du 13 juin 1997" (31 employees in unit) (*Having regard to the agreement of the parties*)

Number of names of persons on revised voters' list	31
Number of persons who cast ballots	26
Number of ballots excluding segregated ballots cast by persons whose names appear on voter's list	31
Number of ballots marked in favour of applicant	19
Number of ballots marked against applicant	7

0929-97-R: Canadian Union of Postal Workers (Applicant) v. Modern Building Cleaning Inc. (Respondent)

Unit: "all employees of Modern Building Cleaning Inc. engaged in building cleaning and maintenance at 4255 Walker Road in Windsor, Ontario, save and except supervisors, persons above the rank of supervisor and office staff and clerical staff" (7 employees in unit) (*Having regard to the agreement of the parties*)

Number of names of persons on revised voters' list	7
Number of persons who cast ballots	6
Number of ballots excluding segregated ballots cast by persons whose names appear on voter's list	6
Number of ballots marked in favour of applicant	4
Number of ballots marked against applicant	2

0940-97-R: Ontario Nurses' Association (Applicant) v. Community Care Access Centre of Halton (Respondent)

Unit: "all placement coordinators employed at the Community Care Access Centre of Halton in the Town of Oakville, save and except manager and persons above the rank of manager" (4 employees in unit) (*Having regard to the agreement of the parties*)

Number of names of persons on revised voters' list	4
Number of persons who cast ballots	4
Number of ballots excluding segregated ballots cast by persons whose names appear on voter's list	4
Number of ballots marked in favour of applicant	4

0955-97-R: Ontario Nurses' Association (Applicant) v. 992323 Ontario Limited c.o.b. as Arbor Living Centers, Newmarket (Respondent)

Unit: "all registered and graduate nurses employed by 992323 Ontario Limited c.o.b. as Arbor Living Centers, Newmarket in the Town of Newmarket, save and except nurse managers and persons above the rank of nurse manager" (17 employees in unit) (*Having regard to the agreement of the parties*)

Number of names of persons on revised voters' list	17
Number of persons who cast ballots	13

Number of ballots excluding segregated ballots cast by persons whose names appear on voter's list	12
Number of segregated ballots cast by persons whose names do not appear on voters' list	1
Number of ballots marked in favour of applicant	11
Number of ballots marked against applicant	1
Number of ballots segregated and not counted	1

0990-97-R: Teamsters Local Union 91 (Applicant) v. C.A.A. North and East Ontario (Respondent)

Unit: "all employees in the Road Services and Communication Centre of CAA North and East Ontario at 2525 Carling Avenue in the Regional Municipality of Ottawa-Carleton, save and except supervisors, persons above the rank of supervisor, and persons covered by a subsisting collective agreement" (36 employees in unit) (*Having regard to the agreement of the parties*)

Number of names of persons on revised voters' list	36
Number of persons who cast ballots	29
Number of ballots excluding segregated ballots cast by persons whose names appear on voter's list	17
Number of segregated ballots cast by persons whose names appear on voter's list	10
Number of segregated ballots cast by persons whose names do not appear on voters' list	2
Number of ballots marked in favour of applicant	16
Number of ballots marked against applicant	1
Number of ballots segregated and not counted	12

0991-97-R: International Brotherhood of Painters and Allied Trades, Local Union 1891 (Applicant) v. Decor Enterprises Corp. (Respondent)

Unit: "all painters and painters' apprentices in the employ of Decor Enterprises Corp. in the industrial, commercial and institutional sector of the construction industry in the Province of Ontario, and all painters and painters' apprentices in the employ of Decor Enterprises Corp. in all sectors of the construction industry in the Municipality of Metropolitan Toronto, the Regional Municipalities of Peel and York, the Towns of Oakville and Halton Hills and that portion of the Town of Milton within the geographic Townships of Esquesing and Trafalgar, and the Towns of Ajax and Pickering in the Regional Municipality of Durham, excluding the industrial, commercial and institutional sector, save and except non-working foremen and persons above the rank of non-working foreman" (9 employees in unit)

Number of names of persons on revised voters' list	0
Number of persons who cast ballots	5
Number of ballots excluding segregated ballots cast by persons whose names appear on voter's list	5
Number of ballots marked in favour of applicant	5

0993-97-R: Ontario Public School Teachers' Federation (Applicant) v. West Parry Sound Board of Education (Respondent)

Unit: "all Occasional Teachers employed by the West Parry Sound Board of Education in its elementary panel in the District of Parry Sound, save and except persons who, when they are employed as substitutes for other teachers are teachers as defined in the School Boards and Teachers Collective Negotiations Act" (0 employees in unit) (*Having regard to the agreement of the parties*) (*Clarity Note*)

Number of names of persons on revised voters' list	47
Number of persons who cast ballots	14
Number of ballots excluding segregated ballots cast by persons whose names appear on voter's list	14
Number of ballots marked in favour of applicant	14

1013-97-R: Ontario Secondary School Teachers' Federation (Applicant) v. The Carleton Board of Education (Respondent)

Unit: “all employees employed as Special Education Teacher Assistants regularly employed by The Carleton Board of Education for less than 24 hours per week, save and except employees in bargaining units for which any trade union held bargaining rights as of June 19, 1997” (37 employees in unit) (*Having regard to the agreement of the parties*)

Number of names of persons on revised voters' list	37
Number of persons who cast ballots	30
Number of ballots excluding segregated ballots cast by persons whose names appear on voter's list	30
Number of ballots marked in favour of applicant	27
Number of ballots marked against applicant	3

1014-97-R: International Union of Operating Engineers, Local 796 (Applicant) v. Brookfield Management Services Eastern Limited (Respondent)

Unit: “all building operators and helpers, parking attendants and porters in the employ of Brookfield Management Services Eastern Limited at 33 Yonge Street in the Municipality of Metropolitan Toronto, save and except supervisors, persons above the rank of supervisor, office and clerical staff” (13 employees in unit) (*Having regard to the agreement of the parties*)

Number of names of persons on revised voters' list	13
Number of persons who cast ballots	10
Number of ballots excluding segregated ballots cast by persons whose names appear on voter's list	10
Number of ballots marked in favour of applicant	10

1015-97-R: Teamsters, Chemical Energy and Allied Workers Local Union 1880 (Applicant) v. Dominion Colour Corporation (Respondent)

Unit: “all quality control laboratory operators employed by Dominion Colour Corporation at its New Toronto Plant at 199 New Toronto St. in the Municipality of Metropolitan Toronto, save and except supervisors and persons above the rank of supervisor” (5 employees in unit) (*Having regard to the agreement of the parties*)

Number of names of persons on revised voters' list	5
Number of persons who cast ballots	4
Number of ballots excluding segregated ballots cast by persons whose names appear on voter's list	4
Number of ballots marked in favour of applicant	4
Number of ballots marked against applicant	0

1025-97-R: Canadian Union of Public Employees (Applicant) v. Pilot Place Society (Respondent)

Unit: “all employees of Pilot Place Society in the Municipality of Metropolitan Toronto, save and except Assistant Director, Program Co-ordinator and Executive Director and persons above the rank of Assistant Director, Program Co-ordinator and Executive Director” (8 employees in unit) (*Having regard to the agreement of the parties*)

Number of names of persons on revised voters' list	12
Number of persons who cast ballots	10
Number of ballots excluding segregated ballots cast by persons whose names appear on voter's list	8
Number of segregated ballots cast by persons whose names appear on voter's list	2
Number of ballots marked in favour of applicant	7
Number of ballots marked against applicant	1

1034-97-R: Independent Workers Union (Applicant) v. Quinte & Region Community Homes (Respondent)

Unit: “all employees of Quinte & Region Community Homes in the County of Hastings, save and except Executive Director and persons above the rank of Executive Director” (3 employees in unit) (*Having regard to the agreement of the parties*)

Number of names of persons on revised voters' list	3
Number of persons who cast ballots	3
Number of ballots excluding segregated ballots cast by persons whose names appear on voter's list	3
Number of spoiled ballots	0
Number of ballots marked in favour of applicant	3
Number of ballots marked against applicant	0
Number of ballots segregated and not counted	0

1047-97-R: Brewery, General and Professional Workers' Union (Applicant) v. St. Joseph Health Centre (Respondent) v. United Plant Guard workers of America (Incumbent Trade Union)

Unit: "all security guards employed at St. Joseph Health Centre, save and except supervisors, persons above the rank of supervisor employees regularly employed for not more than 24 hours per week and students employed during the school vacation period" (14 employees in unit) (*Having regard to the agreement of the parties*)

Number of names of persons on revised voters' list	15
Number of persons who cast ballots	9
Number of ballots, excluding segregated ballots, cast by persons whose names appear on voters' list	9
Number of ballots marked in favour of applicant	9
Number of ballots marked against applicant	0

1069-97-R: United Food and Commercial Workers International Union (Applicant) v. Coca-Cola Bottling Ltd. (Respondent)

Unit: "all employees of Coca-Cola Bottling Ltd. employed in manufacturing and warehousing at 2 Champagne Drive in the Municipality of Metropolitan Toronto, save and except supervisors, persons above the rank of supervisor, office, clerical, technical, sales and dispatch staff, parts administrator, inventory analyst, maintenance planner, employees regularly employed for not more than 24 hours per week and students employed during school vacation periods" (98 employees in unit) (*Having regard to the agreement of the parties*)

Number of names of persons on revised voters' list	100
Number of persons who cast ballots	93
Number of ballots excluding segregated ballots cast by persons whose names appear on voter's list	83
Number of segregated ballots cast by persons whose names appear on voter's list	10
Number of ballots marked in favour of applicant	48
Number of ballots marked against applicant	38
Number of ballots segregated and not counted	7

1087-97-R: International Brotherhood of Electrical Workers, Local 353 (Applicant) v. Virgo Electric Limited and Virgo One Electric Ltd. (Respondents)

Unit: "all electricians and electricians' apprentices in the employ of Virgo Electric Limited and Virgo One Electric Ltd. in the industrial, commercial and institutional sector of the construction industry in the Province of Ontario, and all electricians and electricians' apprentices in the employ of Virgo Electric Limited and Virgo One Electric Ltd. in all sectors of the construction industry in the Municipality of Metropolitan Toronto, the Regional Municipalities of Peel and York, the Towns of Oakville and Halton Hills and that portion of the Town of Milton within the geographic Townships of Esquesing and Trafalgar, and the Towns of Ajax and Pickering in the Regional Municipality of Durham; the Regional Municipality of Durham (except for the Towns of Ajax and Pickering), the geographic Township of Cavan in the County of Peterborough and the geographic Township of Manvers in the County of Victoria and the County of Simcoe and the District Municipality of Muskoka, excluding the industrial, commercial and institutional sector, save and except non-working foremen and persons above the rank of non-working foreman" (4 employees in unit)

Number of names of persons on revised voters' list	3
Number of persons who cast ballots	1

Number of ballots excluding segregated ballots cast by persons whose names appear on voter's list	1
Number of ballots marked in favour of applicant	1

1092-97-R: Carpenters and Allied Workers Local 27 United Brotherhood of Carpenters and Joiners of America (Applicant) v. Ducharme Seating International Inc. (Respondent)

Unit: "all carpenters and carpenters' apprentices in the employ of Ducharme Seating International Inc. in the industrial, commercial and institutional sector of the construction industry in the Province of Ontario, and all carpenters and carpenters' apprentices in the employ of Ducharme Seating International Inc. in all sectors of the construction industry in the Municipality of Metropolitan Toronto, the Regional Municipalities of Peel and York, the Towns of Oakville and Halton Hills and that portion of the Town of Milton within the geographic Townships of Esquesing and Trafalgar, and the Towns of Ajax and Pickering in the Regional Municipality of Durham, excluding the industrial, commercial and institutional sector, save and except non- working foremen and persons above the rank of non-working foreman" (4 employees in unit)

Number of names of persons on revised voters' list	7
Number of persons who cast ballots	3
Number of ballots excluding segregated ballots cast by persons whose names appear on voter's list	3
Number of ballots marked in favour of applicant	3
Number of ballots marked against applicant	0

1094-97-R: Communications, Energy & Paperworkers Union of Canada (CEP) (Applicant) v. Consumers Gas Company Ltd. (Respondent)

Unit: "all employees of Consumers Gas Company Ltd. in the City of Whitby engaged in selling of appliances, save and except store managers, persons above the rank of store manager and persons in bargaining units for which any trade union held bargaining rights as of June 27, 1997" (3 employees in unit) (*Having regard to the agreement of the parties*)

Number of names of persons on revised voters' list	3
Number of persons who cast ballots	1
Number of ballots excluding segregated ballots cast by persons whose names appear on voter's list	1
Number of ballots marked in favour of applicant	1

1104-97-R: United Steelworkers of America (Applicant) v. Barnes Security Services Ltd. (Respondent) v. United Plant Guard Workers of America (Local 1962) (Intervener)

Unit: "all employees of Barnes Security Services Ltd. in the County of Hastings and at Parkdale Street (Interlink site) in Brockville, save and except Supervisors and persons above the rank of Supervisor, dispatch, office and sales staff and persons in bargaining units for which the United Steelworkers of America and the Canadian Autoworkers Union held bargaining rights as of June 27, 1997" (24 employees in unit) (*Having regard to the agreement of the parties*)

Number of names of persons on revised voters' list	27
Number of persons who cast ballots	16
Number of ballots excluding segregated ballots cast by persons whose names appear on voter's list	16
Number of ballots marked in favour of applicant	15
Number of ballots marked in favour of intervener	1

1148-97-R: Canadian Union of Professional Security-Guards (Applicant) v. Ontario Potatoe Distributing Inc. & Harzuz Holdings Limited c.o.b. as the Galleria Shopping Centre (Respondent)

Unit: "all security guards employed by Ontario Potatoe Distributing Inc. & Harzuz Holdings Limited c.o.b. as the Galleria Shopping Centre, at 1245 Dupont Street in the City of Toronto, save and except Property Manager and

persons above the rank of Property Manager” (5 employees in unit) (*Having regard to the agreement of the parties*)

Number of names of persons on revised voters’ list	5
Number of persons who cast ballots	5
Number of ballots excluding segregated ballots cast by persons whose names appear on voter’s list	5
Number of spoiled ballots	1
Number of ballots marked in favour of applicant	4
Number of ballots marked against applicant	0

1157-97-R: The United Brotherhood of Carpenters and Joiners of America, Local 2041 (Applicant) v. Construction S.P.D.G. enr. (Respondent)

Unit: “all carpenters and carpenters’ apprentices in the employ of Construction S.P.D.G. enr., in the industrial, commercial and institutional sector of the construction industry in the Province of Ontario, and all carpenters and carpenters’ apprentices in the employ of Construction S.P.D.G. enr. in all sectors of the construction industry in the Regional Municipality of Ottawa-Carleton, and the United Counties of Prescott and Russell, excluding the industrial, commercial and institutional sector, save and except non-working foremen and persons above the rank of non-working foreman” (2 employees in unit) (*Having regard to the agreement of the parties*)

Number of names of persons on revised voters’ list	0
Number of persons who cast ballots	2
Number of ballots excluding segregated ballots cast by persons whose names appear on voter’s list	2
Number of ballots marked in favour of applicant	2
Number of ballots marked against applicant	0

1250-97-R: United Food & Commercial Workers, Local 206 Chartered by the United Food and Commercial Workers International Union A.F.L., C.I.O., C.L.C. (Applicant) v. Jus-Char Foods Inc. carrying on business as Swiss Chalet Restaurant #188 (Respondent)

Unit: “all employees of Jus-Char Foods Inc. carrying on business as Swiss Chalet Restaurant #188 employed as waitresses, waiters, buspersons, kitchen staff, cashiers, bartenders, and students, at 3 Gateway Boulevard, Bramalea, Ontario, save and except Assistant Dining Room Manager and persons above the rank of Assistant Dining Room Manager” (58 employees in unit) (*Having regard to the agreement of the parties*)

Number of names of persons on revised voters’ list	52
Number of persons who cast ballots	44
Number of ballots excluding segregated ballots cast by persons whose names appear on voter’s list	43
Number of segregated ballots cast by persons whose names appear on voter’s list	0
Number of segregated ballots cast by persons whose names do not appear on voters’ list	1
Number of spoiled ballots	1
Number of ballots marked in favour of applicant	23
Number of ballots marked against applicant	20
Number of ballots segregated and not counted	0

1255-97-R: Christian Labour Association of Canada (Applicant) v. Accutron Inc. (Respondent)

Unit: “all employees of Accutron Inc. in the City of London, save and except Plant Managers and persons above the rank of Plant Manager, office, clerical and sales staff” (20 employees in unit) (*Having regard to the agreement of the parties*)

Number of names of persons on revised voters’ list	22
Number of persons who cast ballots	21
Number of ballots excluding segregated ballots cast by persons whose names appear on voter’s list	20
Number of segregated ballots cast by persons whose names appear on voter’s list	1

Number of ballots marked in favour of applicant	17
Number of ballots marked against applicant	3
Number of ballots segregated and not counted	1

1256-97-R: International Brotherhood of Electrical Workers, Construction Council of Ontario (Applicant) v. Tri-Bec Inc. (Respondent)

Unit #1: “all electricians and electricians’ apprentices in the employ of Tri-Bec Inc. in the industrial, commercial and institutional sector of the construction industry in the Province of Ontario, and all electricians and electricians’ apprentices in the employ of Tri-Bec Inc. in all sectors of the construction industry in the United Counties of Stormont, Dundas and Glengarry, excluding the industrial, commercial and institutional sector, save and except non-working foremen and persons above the rank of non-working foreman”; “tous les électriciens et apprentis-électriciens au service de Tri-Bec Inc. dans le secteur industriel, commercial et institutionnel de l’industrie de la construction de la province de l’Ontario, à l’exclusion des contremaîtres non actifs et des personnes au-dessus du rang de contremaître non actif tous les électriciens et apprentis-électriciens au service de Tri-Bec Inc. dans tous les secteurs de l’industrie de la construction dans les comtés unis de Stormont, Dundas et Glengarry, à l’exclusion du secteur industriel, commercial et institutionnel, à l’exclusion des contremaîtres non actifs et des personnes au-dessus du rang de contremaître non actif” (3 employees in unit)

Number of names of persons on revised voters’ list	3
Number of persons who cast ballots	2
Number of ballots excluding segregated ballots cast by persons whose names appear on voter’s list	2
Number of ballots marked in favour of applicant	2
Number of ballots marked against applicant	0

Applications for Certification Dismissed Without Vote

0093-97-R: Carpenters and Allied Workers Local 27, United Brotherhood of Carpenters and Joiners of America (Applicant) v. The Board of Education for the City of North York (Respondent) v. United Brotherhood of Carpenters and Joiners of America, Local 3219 (Intervener)

Unit: “all carpenters and carpenters’ apprentices in the employ of The Board of Education for the City of North York in the industrial, commercial and institutional sector of the construction industry in the Province of Ontario and all carpenters and carpenters’ apprentices in the employ of The Board of Education for the City of North York in all other sectors of the construction industry in the Municipality of Metropolitan Toronto, the Regional Municipalities of Peel and York, the Towns of Oakville and Halton Hills and that portion of the Town of Milton within the geographic Townships of Esquering and Trafalgar, and the Towns of Ajax and Pickering in the Regional Municipality of Durham; and the County of Simcoe and the District Municipality of Muskoka, save and except non-working foremen and persons above the rank of non-working foreman” (28 employees in unit)

0149-97-R: Carpenters and Allied Workers Local 27, United Brotherhood of Carpenters and Joiners of America (Applicant) v. The Board of Education for the Borough of East York (Respondent)

Unit: “all carpenters and carpenters’ apprentices in the employ of the Board of Education for the Borough of East York in the industrial, commercial and institutional sector of the construction industry in the Province of Ontario and all carpenters and carpenters’ apprentices in the employ of the Board of Education for the Borough of East York in all other sectors of the construction industry in the Municipality of Metropolitan Toronto, the Regional Municipalities of Peel and York, the Towns of Oakville and Halton Hills and that portion of the Town of Milton within the geographic Townships of Esquering and Trafalgar, and the Towns of Ajax and Pickering in the Regional Municipality of Durham; and the County of Simcoe and the District Municipality of Muskoka, save and except non-working foremen and persons above the rank of non-working foreman .” (12 employees in unit)

1046-97-R: Brewery, General and Professional Workers’ Union (Applicant) v. St. Joseph Health Centre (Respondent) v. United Plant Guard Workers of America (Incumbent Trade Union)

Unit: “all security guards employed at St. Joseph Health Centre, save and except supervisors, persons above the rank of supervisor, employees regularly employed for more than 24 hours per week and students employed during the summer vacation period” (10 employees in unit)

1064-97-R: Labourers’ International Union of North America (Applicant) v. Rex Lumber Corporation (Respondent) v. Carpenters and Allied Workers Local 27, United Brotherhood of Carpenters and Joiners of America (Intervener)

Applications for Certification Dismissed Subsequent to Vote

0700-97-R: Teamsters Local Union 938 (Applicant) v. Lockerby Taxi Inc. (Respondent)

Unit: “all employees of Lockerby Taxi Inc. in the City of Sudbury, save and except supervisors and persons above the rank of supervisor” (58 employees in unit)

0769-97-R: Labourers’ International Union of North America, Local 1059 (Applicant) v. Century Building Services Division of Century Distribution Inc. (Respondent)

Unit: “all employees of Century Building Services Division of Century Distribution Inc. employed in the City of London, excluding employees covered by a subsisting collective agreement between the applicant and the employer at 111 Horton Street, London, Ontario, save and except supervisors, persons above the rank of supervisor, sales, clerical and office staff” (11 employees in unit)

Number of names of persons on revised voters’ list	20
Number of persons who cast ballots	19
Number of ballots excluding segregated ballots cast by persons whose names appear on voter’s list	19
Number of ballots marked in favour of applicant	8
Number of ballots marked against applicant	11

0892-97-R: London & District Service Workers’ Union, Local 220, S.E.I.U., C.I.O., C.L.C., A.F.L. (Applicant) v. Samuel’s of London Inc. (Respondent)

Unit: “all employees of Samuel’s of London, Inc. at 1449 Dundas Street in London, Ontario, save and except persons above the rank of supervisor” (22 employees in unit)

Number of names of persons on revised voters’ list	23
Number of persons who cast ballots	21
Number of ballots excluding segregated ballots cast by persons whose names appear on voter’s list	19
Number of segregated ballots cast by persons whose names appear on voter’s list	2
Number of spoiled ballots	1
Number of ballots marked in favour of applicant	7
Number of ballots marked against applicant	11
Number of ballots segregated and not counted	2

0926-97-R: Canadian Hotel and Service Workers Union (Applicant) v. Premier Health Clubs (Respondent)

Unit: “all employees in the employ of Premier Health Clubs, Mississauga West, 1100 Burnhamthorpe Road West, Ontario, save and except supervisors and persons above the rank of supervisor” (22 employees in unit)

Number of names of persons on revised voters’ list	48
Number of persons who cast ballots	31
Number of ballots marked in favour of applicant	0
Number of ballots marked against applicant	31
Number of ballots segregated and not counted	7

0974-97-R: Teamsters Local Union No. 419 (Applicant) v. White Rose Crafts & Nursery Sales Limited (Respondent)

Unit: “all employees of White Rose Crafts & Nursery Sales Limited employed at its Distribution Centre in the City of Vaughan, save and except supervisors and persons above the rank of supervisor, office and sales employees.” (54 employees in unit)

Number of names of persons on revised voters’ list	55
Number of persons who cast ballots	54
Number of ballots excluding segregated ballots cast by persons whose names appear on voter’s list	50
Number of segregated ballots cast by persons whose names appear on voter’s list	3
Number of segregated ballots cast by persons whose names do not appear on voters’ list	1
Number of ballots marked in favour of applicant	23
Number of ballots marked against applicant	27
Number of ballots segregated and not counted	4

0992-97-R: Service Employees International Union, Local 204, Affiliated with the S.E.I.U., A.F. of L., C.I.O., C.L.C. (Applicant) v. The General Synod of The Anglican Church of Canada (Respondent)

Unit: “all employees of the Anglican Church of Canada in Metropolitan Toronto, save and except supervisors and persons above the rank of supervisor” (108 employees in unit)

Number of names of persons on revised voters’ list	108
Number of persons who cast ballots	88
Number of ballots excluding segregated ballots cast by persons whose names appear on voter’s list	82
Number of segregated ballots cast by persons whose names appear on voter’s list	5
Number of segregated ballots cast by persons whose names do not appear on voters’ list	1
Number of spoiled ballots	1
Number of ballots marked in favour of applicant	27
Number of ballots marked against applicant	54
Number of ballots segregated and not counted	6

1140-97-R: National Automobile, Aerospace, Transportation and General Workers Union of Canada (CAW-Canada) (Applicant) v. Pentalift Equipment Corporation (Respondent)

Unit: “all employees of Pentalift Equipment Corporation in the City of Guelph, or in the Township of Puslinch, Ontario, save and except supervisors, persons above the rank of supervisor, office, clerical, sales staff, engineering staff, students employed during the school vacation period” (132 employees in unit)

Number of names of persons on revised voters’ list	75
Number of persons who cast ballots	74
Number of ballots excluding segregated ballots cast by persons whose names appear on voter’s list	64
Number of segregated ballots cast by persons whose names appear on voter’s list	10
Number of ballots marked in favour of applicant	30
Number of ballots marked against applicant	34
Number of ballots segregated and not counted	10

Applications for Certification Withdrawn

4246-96-R: Labourers’ International Union of North America, Local 183 (Applicant) v. Acorn Development Corporation (Respondent)

0703-97-R: United Brotherhood of Carpenters and Joiners of America, Local 1669 (Applicant) v. Industria Service Corporation (Respondent)

0880-97-R: Canadian Hotel and Service Workers Union (Applicant) v. Premier Health Clubs (Respondent)

1108-97-R: The United Brotherhood of Carpenters and Joiners of America, Local 2041 (Applicant) v. C.D. Interior Ltd. (Respondent)

1154-97-R: Millwrights Local 2309, United Brotherhood of Carpenters and Joiners of America (Applicant) v. GMB Millwrights (Respondent)

1155-97-R: United Steelworkers of America (Applicant) v. North American Security Services Inc. (Respondent) v. Canadian Union of Professional Security-Guards (Intervener)

1182-97-R: National Automobile, Aerospace, Transportation and General Workers Union of Canada (CAW-Canada) (Applicant) v. Sivaco Ontario (Respondent)

APPLICATIONS UNDER SECTION 6 OF BILL 7

3888-95-R: Teamsters Local Union 230 affiliated with the International Brotherhood of Teamsters (Applicant) v. Permanent Lafarge, A Division of Lafarge Canada, Inc. (Respondent) (*Endorsed Settlement*)

FIRST AGREEMENT - DIRECTION

1276-97-FC: United Food and Commercial Workers International Union and Retail, Wholesale and Department Store Union, Local 427 of the Retail, Wholesale and Department Store Union District Council of the United Food and Commercial Workers International Union (Applicant) v. East Coast Holdings Limited (Respondent) (*Withdrawn*)

APPLICATIONS FOR DECLARATION OF RELATED EMPLOYER

4215-95-R: Labourers' International Union of North America, Local 1089 (Applicant) v. Rich Mac Construction Co. Ltd., C & C Enterprises Electrical Construction Limited, Anderson-Webb Mechanical Contractors, C & C Construction Electrical and C & C Instrumentation o/a 50429 Ontario Limited (Respondents) v. United Brotherhood of Carpenters and Joiners of America, Local 1256, International Brotherhood of Electrical Workers, Local 530, United Association of Journeymen and Apprentices of the Plumbing and Pipe Fitting Industry of the United States and Canada, Local 663 (Interveners) (*Withdrawn*)

0637-96-R: International Alliance of Theatrical Stage Employees, Local 471 (Applicant) v. Universal Concerts Canada, Concert Productions International, Ogden Entertainment Services (Respondents) v. NASCO Services Inc. (Intervener) (*Granted*)

2179-96-R: Drywall Acoustic Lathing and Insulation Local 675 of the United Brotherhood of Carpenters and Joiners of America (Applicant) v. Daltra Limited and 737049 Ontario Ltd. c.o.b. as D'Luxe Drywall (1987) and Battlefield Drywall Inc. (Respondents) (*Granted*)

3080-96-R: United Association of Journeymen and Apprentices of the Plumbing and Pipefitting Industry of the United States and Canada, Local 552 (Applicant) v. INC Contractors Ltd. and Esken Mechanical Contractors Inc. (Respondents) (*Withdrawn*)

3166-96-R: United Steelworkers of America (Applicant) v. Greenhills Corporation Inc., Greenhills Food Ltd., and 1096590 Ontario Ltd. (operating as Greenhills Food Services Inc.) (Respondent) (*Granted*)

3222-96-R: Labourers' International Union of North America, Local 1059 (Applicant) v. University of Western Ontario, UWO Research Park, Gaines Construction and Development Company, Harper Masonry Inc., and Ellis-Don Construction Ltd. (Respondents) (*Terminated*)

3224-96-R: International Union of Bricklayers and Allied Craftsmen, Local 5 (Applicant) v. University of Western Ontario, UWO Research Park, Gaines Construction and Development Company, Harper Masonry Inc., and Ellis-Don Construction Ltd. (Respondents) (*Terminated*)

3302-96-R: Labourers' International Union of North America, Local 183 (Applicant) v. Menkes Development Ltd., Murjay Property Management Ltd., Birchland Holdings, 70 Mornelle Court Apts. Ltd. (Respondents) (*Withdrawn*)

3702-96-R: International Brotherhood of Painters and Allied Trades, Local 1819, Glaziers (Applicant) v. Harrison Glass & Mirror Co. Limited, Steven Duck c.o.b. as County Glass and Door, 655639 Ontario Limited, 655639 Ontario Limited operating as Dial One Minden Glass, Steven Duck operating as Pro Glass Services and/or Pro Glazing Services (Respondents) (*Granted*)

4269-96-R: Carpenters and Allied Workers Local 27 United Brotherhood of Carpenters and Joiners of America (Applicant) v. 607015 Ontario Inc., Exterior 59959 Finish Carpentry Ltd. sometimes c.o.b. as Joe Monteiro Developments (Respondents) (*Endorsed Settlement*)

0028-97-R: United Brotherhood of Carpenters and Joiners of America Local 785 (Applicant) v. Taurus Storage Systems Ltd. and KG Installation Inc. (Respondents) (*Withdrawn*)

0059-97-R: United Steelworkers of America (Applicant) v. Canadian Erectors Limited, Marshall Steel Limited, Canerector Inc., Marshall Barwick Inc. (Respondents) (*Withdrawn*)

0064-97-R: Teamsters Local Union No. 230, Ready Mix, Building Supply, Hydro and Construction Drivers, Warehousemen and Helpers, Affiliated with the International Brotherhood of Teamsters (Applicant) v. Mibro Partners, c.o.b. The Mibro Group and Kimbrox Packaging Limited (Respondents) (*Withdrawn*)

0594-97-R: Barwick Steel Limited and Canadian Erectors Limited (Applicant) v. United Steel Workers of America and its Local 7012 (Respondent) (*Withdrawn*)

1101-97-R: International Brotherhood of Painters and Allied Trades, Local Union 1819 (Glaziers) (Applicant) v. 489584 Ontario Limited operating as F.G. Aluminum and TNT Glazing Ltd. (Respondents) (*Withdrawn*)

SALE OF A BUSINESS

2376-95-R: Windsor Regional Hospital (Applicant) v. The Canadian Power Engineers and Skilled Trades Union, The Canadian Union of Operating Engineers and General Workers, Local 100 and Service Employees Union, Local 210 (Respondents) (*Withdrawn*)

4215-95-R: Labourers' International Union of North America, Local 1089 (Applicant) v. Rich Mac Construction Co. Ltd., C & C Enterprises Electrical Construction Limited, Anderson-Webb Mechanical Contractors, C & C Construction Electrical and C & C Instrumentation o/a 50429 Ontario Limited (Respondents) v. United Brotherhood of Carpenters and Joiners of America, Local 1256, International Brotherhood of Electrical Workers, Local 530, United Association of Journeymen and Apprentices of the Plumbing and Pipe Fitting Industry of the United States and Canada, Local 663 (Interveners) (*Withdrawn*)

0637-96-R: International Alliance of Theatrical Stage Employees, Local 471 (Applicant) v. Universal Concerts Canada, Concert Productions International, Ogden Entertainment Services (Respondents) v. NASCO Services Inc. (Intervener) (*Granted*)

1774-96-R: Perth and Smith Falls District Hospital (Applicant) v. Ontario Public Service Employees Union, Canadian Union of Public Employees and its Local 2119, Association of Allied Health Professionals: Ontario, Independent Canadian Transit Union and its Local 6 (Respondents) v. Non-Union Employees, Perth and Smith Falls District Hospital (Intervener) (*Granted*)

2179-96-R: Drywall Acoustic Lathing and Insulation Local 675 of the United Brotherhood of Carpenters and Joiners of America (Applicant) v. Daltra Limited and 737049 Ontario Ltd. c.o.b. as D'Luxe Drywall (1987) and Battlefield Drywall Inc. (Respondents) (*Granted*)

3080-96-R: United Association of Journeymen and Apprentices of the Plumbing and Pipefitting Industry of the United States and Canada, Local 552 (Applicant) v. INC Contractors Ltd. and Esken Mechanical Contractors Inc. (Respondents) (*Withdrawn*)

3222-96-R: Labourers' International Union of North America, Local 1059 (Applicant) v. University of Western Ontario, UWO Research Park, Gaines Construction and Development Company, Harper Masonry Inc., and Ellis-Don Construction Ltd. (Respondents) (*Terminated*)

3224-96-R: International Union of Bricklayers and Allied Craftsmen, Local 5 (Applicant) v. University of Western Ontario, UWO Research Park, Gaines Construction and Development Company, Harper Masonry Inc., and Ellis-Don Construction Ltd. (Respondents) (*Terminated*)

3302-96-R: Labourers' International Union of North America, Local 183 (Applicant) v. Menkes Development Ltd., Murjay Property Management Ltd., Birchland Holdings, 70 Mornelle Court Apts. Ltd. (Respondents) (*Withdrawn*)

3702-96-R: International Brotherhood of Painters and Allied Trades, Local 1819, Glaziers (Applicant) v. Harrison Glass & Mirror Co. Limited, Steven Duck c.o.b. as County Glass and Door, 655639 Ontario Limited, 655639 Ontario Limited operating as Dial One Minden Glass, Steven Duck operating as Pro Glass Services and/or Pro Glazing Services (Respondents) (*Granted*)

4269-96-R: Carpenters and Allied Workers Local 27 United Brotherhood of Carpenters and Joiners of America (Applicant) v. 607015 Ontario Inc., Exterior 59959 Finish Carpentry Ltd. sometimes c.o.b. as Joe Monteiro Developments (Respondents) (*Endorsed Settlement*)

0028-97-R: United Brotherhood of Carpenters and Joiners of America Local 785 (Applicant) v. Taurus Storage Systems Ltd. and KG Installation Inc. (Respondents) (*Withdrawn*)

0594-97-R: Barwick Steel Limited and Canadian Erectors Limited (Applicant) v. United Steel Workers of America and its Local 7012 (Respondent) (*Withdrawn*)

1101-97-R: International Brotherhood of Painters and Allied Trades, Local Union 1819 (Glaziers) (Applicant) v. 489584 Ontario Limited operating as F.G. Aluminum and TNT Glazing Ltd. (Respondents) (*Withdrawn*)

UNION SUCCESSOR RIGHTS (SUCCESSOR STATUS)

0061-97-R: United Food and Commercial Workers' Local Union 326W, Ernest G. Reed, S. Booth, R. Booth, G. Scott J. Morin, K. Morse, R. Churchill, M. Keating, I. Bunting, R. Edwards, C. Fekete, S. Young, and C. Hackney (Applicant) v. United Brewers Warehousing Workers' Provincial Board (Respondent) v. United Food and Commercial Workers Local 278W, United Food and Commercial Workers Local 311W, United Food and Commercial Workers Local 334W, United Food and Commercial Workers Local 336W, United Food and Commercial Workers Local 369W, United Food and Commercial Workers Local 321W, United Food and Commercial Workers Local 329W, United Food and Commercial Workers Local 335W, United Food and Commercial Workers Local 358W, United Food and Commercial Workers Local 371W, United Food & Commercial Workers International Union (Intervenors) (*Dismissed*)

APPLICATIONS FOR DECLARATION TERMINATING BARGAINING RIGHTS

3894-95-R: Teamsters Local Union 230 affiliated with the International Brotherhood of Teamsters (Applicant) v. St. Lawrence Cement Inc. (Respondent) (*Endorsed Settlement*)

2483-96-R: Manzoor Khan Niazi, Abdul Ala Khan, and Hamid Elias on behalf of themselves & on behalf of all petitioning drivers (Applicant) v. Retail Wholesale Canada, Canadian Service Sector Division of the United

Steelworkers of America and Local 1688, The Ontario Taxi Union (Respondent) v. Diamond Taxicab Association (Toronto) Limited and Diamond Taxicab Associates Committee (Interveners) (*Dismissed*)

2858-96-R: W. Steven Peevers, Wasim Chauhan on behalf of themselves and on behalf of all petitioning drivers (Applicant) v. Retail Wholesale Canada, Canadian Service Sector Division of the United Steelworkers of America and Local 1688, The Ontario Taxi Union (Respondent) v. Diamond Taxicab Association (Toronto) Ltd. (Intervener) (*Withdrawn*)

0711-97-R: Hanrahan's Tavern (Applicant) v. Hotel Employees Restaurant Employees Union, Local 75 of the Hotel Employees Restaurant Employees International Union (Respondent) (*Withdrawn*)

0859-97-R: John R. Leach (Applicant) v. Glass, Molders, Pottery, Plastics and Allied Workers International Union (Respondent) v. Meridian Accurcast Limited (Intervener)

Unit: "all employees of Meridian Accurcast Limited, Wallaceburg, save and except Supervisors, persons above the rank of Supervisor, Office, Sales and Technical Staff" (286 employees in unit) (*Granted*)

Number of names of persons on revised voters' list	287
Number of persons who cast ballots	242
Number of ballots excluding segregated ballots cast by persons whose names appear on voter's list	242
Number of spoiled ballots	2
Number of ballots marked in favour of respondent	19
Number of ballots marked against respondent	221

0862-97-R: Drivers and Independent Contractors, Local 1688 Retail Wholesale Canada, working under Union Taxi Sign North Bay (Applicant) v. Retail Wholesale Canada Canadian Service Sector Division of the United Steel Workers Local 1688 Ontario Taxi Union (Respondent) v. Union Taxi (Intervener) (*Dismissed*)

0878-97-R: Mary Daisley (Applicant) v. Teamsters Local Union No. 879 (Respondent) v. Boreal Laboratories Ltd. (Intervener)

Unit: "all the employees of Boreal Laboratories Ltd. in the City of St. Catharines, save and except supervisors, persons above the rank of supervisor, office staff, sales staff and persons employed pursuant to a Co-op Education Program sponsored by a college, university or high school" (8 employees in unit) (*Granted*)

Number of names of persons on revised voters' list	8
Number of persons who cast ballots	7
Number of ballots excluding segregated ballots cast by persons whose names appear on voter's list	7
Number of ballots marked in favour of respondent	0
Number of ballots marked against respondent	7

0881-97-R: Christian Simard, on his own behalf and on behalf of a group of employees of Dew Engineering and Development Limited (Applicant) v. Retail, Wholesale Canada Canadian Service Sector Division of United Steelworkers of America Local 414 (Respondent) v. Dew Engineering and Development Limited (Intervener)

Unit: "all employees of Dew Engineering and Development Limited in the City of Ottawa, save and except supervisors, persons above the rank of supervisor, office, clerical, quality assurance and sales staff" (31 employees in unit) (*Granted*)

Number of names of persons on revised voters' list	31
Number of persons who cast ballots	31
Number of ballots excluding segregated ballots cast by persons whose names appear on voter's list	31
Number of ballots marked in favour of respondent	11
Number of ballots marked against respondent	20

0971-97-R: Fay Gatenby (Applicant) v. The Canadian Union of Public Employees and its Local No. 3866 (Respondent) v. Temiskaming Lodge (Intervener) (*Dismissed*)

1003-97-R: Tom Hickling, on his own behalf and on behalf of a group of employees of Bourk's Ignition Limited (Applicant) v. United Food and Commercial Workers, Local 351 (Respondent) v. Bourk's Ignition Limited (Intervener)

Unit: "all delivery drivers of Bourk's Ignition Limited in the Regional Municipality of Ottawa-Carleton, save and except dispatchers and persons above the rank of dispatcher." (14 employees in unit) (*Dismissed*)

Number of names of persons on revised voters' list	15
Number of persons who cast ballots	15
Number of ballots excluding segregated ballots cast by persons whose names appear on voter's list	15
Number of ballots marked in favour of respondent	9
Number of ballots marked against respondent	6

1028-97-R: Employees of Scout Security (Applicant) v. United Steelworkers of America, Local 5295 (Respondent)

Unit: "all the employees of the Employer in the County of Wellington and the Regional Municipality of Waterloo, save and except Field Supervisors, persons above the rank of Field Supervisors, Dispatchers, office, clerical and sales staff" (3 employees in unit) (*Granted*)

Number of names of persons on revised voters' list	3
Number of persons who cast ballots	3
Number of ballots excluding segregated ballots cast by persons whose names appear on voter's list	3
Number of ballots marked in favour of respondent	0
Number of ballots marked against respondent	3

1043-97-R: Ziauddin Ahmed, Michael Borden and Yousuf Qasim (Applicant) v. Communications, Energy and Paperworkers Union of Canada and its Local 333-09 (Respondent) (*Granted*)

APPLICATIONS FOR DECLARATION OF UNLAWFUL LOCKOUT

1057-97-U: IWA Canada Local 2693 (Applicant) v. Avenor Inc., Thunder Bay Woodlands Operations (Respondent) (*Withdrawn*)

COMPLAINTS OF UNFAIR LABOUR PRACTICE

2160-95-U: Harold Bartlett, William Gilroy, John Ives, Thomas MacLean, Judy Mitchell, Joseph Mulhall, John Sprackett, Fraser Strong, Ashton Tuck and John Wabb (Applicant) v. International Brotherhood of Electrical Workers, Ken Woods, Tom McGreevy, Al Diggon and International Brotherhood of Electrical Workers, Local 1788 (Respondent) (*Withdrawn*)

0347-96-U: Wayne Robinson (Applicant) v. Amalgamated Transit Union, Local 113 (Respondent) v. Toronto Transit Commission (Intervener) (*Dismissed*)

0372-96-U: Leonard Robinson (Applicant) v. Sheet Metal Workers International Association Local Union #285 (Respondent) (*Withdrawn*)

0894-96-U: Dave Hendershot (Applicant) v. Ontario Jockey Club (Respondent) (*Withdrawn*)

1575-96-U: IWA Canada, Local 1000 (Applicant) v. K I Pembroke Inc. and Scott Deugo (Respondent) (*Granted*)

1633-96-U: Labourers' International Union of North America, Local 183 (Applicant) v. Torbridge Construction Ltd. (Respondent) (*Granted*)

1836-96-U: IWA Canada, Local 1000 (Applicant) v. K I Pembroke Inc. and L. Scott Deugo (Respondent) (*Dismissed*)

2048-96-U: Victor Mazarello (Applicant) v. Canadian Union of Public Employees, Local 218 (Respondent) v. Durham Region Roman Catholic Separate School Board (Intervener) (*Dismissed*)

2156-96-U; 2157-96-U: Labourers' International Union of North America, Local 183 and Mesfin Mamo (Applicant) v. First Canadian Parking Services Inc. c.o.b. as Unit Park (Respondent); Labourers' International Union of North America, Local 183 and Yahya Hussein (Applicant) v. First Canadian Parking Services Inc. c.o.b. as Unit Park (Respondent) (*Withdrawn*)

2403-96-U: International Union of Operating Engineers, Local 793 (Applicant) v. Danruss Contracting (1985 Windsor) Inc. (Respondent) (*Withdrawn*)

2576-96-U: Association of Allied Health Professionals: Ontario (Applicant) v. Eastern Ontario Health Unit (Respondent) (*Withdrawn*)

2795-96-U: Burns J. Macleod, Probation and Parole Officer Ministry of the Solicitor General and Correctional Services, Woodstock, Ontario and Member of Local 117 OPSEU (Applicant) v. The Ministry of the Solicitor General and Correctional Services and John Wass, Acting Area Manager, London East Probation and Parole (Respondent) (*Dismissed*)

3028-96-U: Todd Robins (Applicant) v. Local 247 C.U.P.E. and The Bruce-Grey County Roman Catholic Separate School Board (Respondents) (*Dismissed*)

3093-96-U: Association of Allied Health Professionals: Ontario (Applicant) v. Queensway General Hospital (Respondent) (*Withdrawn*)

3165-96-U: United Steelworkers of America (Applicant) v. Greenhills Corporation Inc., Greenhills Food Ltd., and 1096590 Ontario Ltd. (operating as Greenhills Food Services Inc.) (Respondent) (*Granted*)

3186-96-U; 3187-96-U: Labourers' International Union of North America, Local 1059 (Applicant) v. University of Western Ontario, UWO Research Park, Gaines Construction and Development Company, Harper Masonry Inc., Ellis-Don Construction Ltd. (Respondents); International Union of Bricklayers and Allied Craftsmen, Local 5 (Applicant) v. University of Western Ontario, UWO Research Park, Gaines Construction and Development Company, Harper Masonry Inc., Ellis-Don Construction Ltd. (Respondents) (*Terminated*)

3192-96-U: Azim Babu Ramji (Applicant) v. Textile Processors Service Trade, Employees International Union Local #351A, Metropolitan Toronto Convention Centre Corporation, Laundry & Linen Drivers & Industrial Workers Union Teamster Local 847 (Respondents) (*Withdrawn*)

3577-96-U: Joseph Persaud (Applicant) v. U.S.W.A. Local 8505 (Respondent) (*Dismissed*)

3864-96-U: Maurice H. Garnett (Applicant) v. Local 530W, United Food and Commercial Workers International Union (Respondent) v. R.S.C.L. Distribution Services Inc. (Intervener) (*Dismissed*)

3899-96-U: Sylvia Marguerite Bourgeois (Applicant) v. London and District Service Workers' Union, Local 220 (Respondent) v. London Health Sciences Centre (Intervener) (*Dismissed*)

3914-96-U: The International Association of Machinists and Aerospace Workers, LL 1542 (Applicant) v. Hypernetics Limited (Respondent) (*Withdrawn*)

3984-96-U: Richard Pruyn (Applicant) v. Dave McIntosh Union President USWA Local 4433 (Respondent) v. Marsh Engineering Limited (Intervener) (*Withdrawn*)

4052-96-U: John McEwen, Jean Guy St. Amour and Daniel Sickman (Applicant) v. Operative Plasterers' Cement Mason's Local 598 Toronto (Respondent) (*Terminated*)

4146-96-U: John McEwen, Jean Guy St. Amour and Daniel Sickman (Applicant) v. Operative Plasterers and Cement Mason's Local 598 Toronto (Respondent) v. Colonial Building Restoration (Intervener) (*Withdrawn*)

4169-96-U: Hotel, Restaurant and Hospitality Service Employees Union, Local 442 (Applicant) v. The Prince of Wales Hotel (Respondent) (*Granted*)

4306-96-U: Ontario Liquor Board Employees' Union (Applicant) v. Ambassador Duty Free Management Services Ltd. c.o.b. as The Ambassador Duty Free Store (Respondent) (*Terminated*)

0034-97-U: Labourers' International Union of North America, Local 183 (Applicant) v. Acorn Development Corporation and Adam Smuszkowicz (Respondent) (*Withdrawn*)

0062-97-U; 0367-97-U: National Automobile, Aerospace and Agricultural Implement Workers Union of Canada (CAW-Canada), Local 124 (Applicant) v. Circuit World Corporation, operating as PC World (Respondent) (*Granted*)

0097-97-U: Labourers' International Union of North America, Local 183 (Applicant) v. Apollo 8 Maintenance Services Limited and Eduardo Duarte (Respondents) (*Withdrawn*)

0152-97-U: Canadian Union of Public Employees, Local 1749 (Applicant) v. City of York Board of Education (Respondent) (*Withdrawn*)

0192-97-U: Norma McKenzie (Applicant) v. Ontario Nurses' Association (Respondent) v. Scarborough General Hospital (Intervener) (*Withdrawn*)

0206-97-U: Hervey Maynard (Applicant) v. Amalgamated Transit Union, Local 1573 (Respondent) v. The Corporation of the City of Brampton (Brampton Transit) (Intervener) (*Dismissed*)

0215-97-U: Chantal Hasse (Applicant) v. Algoma District Housing Authority Union, Local 3096 (Respondent) (*Withdrawn*)

0347-97-U: Ibolya Martin (Applicant) v. Catholic Cross-Cultural Services (Respondent) (*Dismissed*)

0561-97-U: Norma Imperial, Erlese Winston, Geraldine Booth (Applicant) v. Service Employees International Union (SEIU) Local 204 (Respondent) (*Withdrawn*)

0570-97-U: Canadian Marine Officers Union (Applicant) v. Niagara Arms Retirement Hotel & Retirement Residences Inc. (Respondent) (*Endorsed Settlement*)

0575-97-U: Hardev Kumar (Applicant) v. Algoods Inc. or Algoods Ltd. Div. of Alcan (Respondent) (*Dismissed*)

0595-97-U: Neil Anderson (Applicant) v. C.A.W. Local 1075 (Respondent) (*Withdrawn*)

0620-97-U: The Office and Professional Employees International Union (Applicant) v. The Dryden District Roman Catholic Separate School Board (Respondent) (*Withdrawn*)

0686-97-U: Judite Santos (Applicant) v. United Food & Commercial Workers Locals 175 and 633 (Respondent) (*Withdrawn*)

0697-97-U: Service Employees' Union, Local 210. (Applicant) v. The Canadian Red Cross Society (Respondent) (*Withdrawn*)

0733-97-U: Sheila Claxton (Applicant) v. Bakery, Confectionery and Tobacco Workers' International Union, Local 264 (Respondent) v. Aloro Foods Inc. (Intervener) (*Withdrawn*)

0807-97-U: Local 400, F.W.D., International Union of Electronic, Electrical, Salaried, Machine and Furniture Workers, AFL-CIO (Applicant) v. Bohmer Box Corporation, a division of A & C Bohmer Limited (Respondent) (*Granted*)

0811-97-U: International Brotherhood of Electrical Workers Construction Council of Ontario and Jim Bryson and Lars Hansen (Applicant) v. 1104644 Ontario Ltd. c.o.b. as Cowie Electrical Services and James Cowie (Respondent) (*Withdrawn*)

0830-97-U: Mark W Knocker (Applicant) v. Boilermakers Union Local 128 (Respondent) (*Withdrawn*)

0870-97-U: United Food and Commercial Workers International Union, Local 175 & 633 (Applicant) v. Pride Beverages Ltd. (Respondent) (*Withdrawn*)

0916-97-U: International Union of Operating Engineers, Local 793 (Applicant) v. Dibblee Construction Limited (Respondent) (*Withdrawn*)

0927-97-U: John Thomas Greenwood (Applicant) v. C.A.W. Union Local 1859 (Respondent) (*Dismissed*)

0975-97-U: Labourers' International Union of North America, Local 1059 (Applicant) v. Century Building Services Division of Century Distribution Inc. (Respondent) (*Withdrawn*)

1005-97-U: Teamsters Local Union 938 (Applicant) v. Skanna Systems Investigations Inc. (Respondent) (*Withdrawn*)

1065-97-U: Devon Brown (Applicant) v. Modern Cleaners (Respondent) (*Dismissed*)

1071-97-U: Ed Tunnacliffe (Applicant) v. Local Union 9392 United Steelworkers of America (Respondent) (*Dismissed*)

1097-97-U: Claudio Console (Applicant) v. J. Hareguy, M. Flood, P. Young, A. Tamane, R. Gardner, T. Barrie, T. Clinton (Respondent) (*Dismissed*)

1120-97-U: Christian Labour Association of Canada (Applicant) v. Scepter Corporation (Respondent) (*Withdrawn*)

APPLICATION FOR INTERIM ORDER

0965-97-M: United Food and Commercial Workers' Local Union 326W, Ernest G. Reed, S. Booth, R. Booth, G. Scott J. Morin, K. Morse, R. Churchill, M. Keating, I. Bunting, R. Edwards, C. Fekete, S. Young, and C. Hackney (Applicants) v. United Food and Commercial Workers' International Union and Brewers Retail Inc. (Respondents) v. United Food and Commercial Workers Local Union 278w Ontario, United Food and Commercial Workers Local 336w, United Food and Commercial Workers Local 311w, United Food and Commercial Workers Local 358w, United Food and Commercial Workers Local 321w, United Food and Commercial Workers Local 335w, United Food and Commercial Workers Local 371w (Intervenors) (*Dismissed*)

1048-97-M: Union of Needletraders, Industrial and Textile Employees (Applicant) v. Vagden Mills Ltd., Ontario Hosiery MFG. Co. Inc., J.B. Field's Inc., John Timothy Denton and, Diane Denton (Respondents) (*Withdrawn*)

1112-97-M: United Food and Commercial Workers' International Union, Locals 278W, 311W, 321W, 329W, 335W, 336W, 358W, 369W, 371W (Applicants) v. United Food and Commercial Workers' Local Union 326W and Ernest G. Reed (Respondents) (*Dismissed*)

1126-97-M: United Brewers Warehousing Workers' Provincial Board (Applicant) v. United Food and Commercial Workers' Local Union 326W, Ernest G. Reed, S. Booth, R. Booth, G. Scott, J. Morin, K. Morse, R. Churchill, M. Keating, I. Bunting, R. Edwards, C. Fekete, S. Young, and C. Hackney (Respondents) (*Dismissed*)

APPLICATIONS FOR RELIGIOUS EXEMPTION

0072-97-M: Rev. Henry P. Epp, Chaplain (Applicant) v. Service Employees' Union Local 210, Leamington Mennonite Home (Respondents) (*Withdrawn*)

0471-97-M: Kemar Doors Inc. (Applicant) v. United Brotherhood of Carpenters and Joiners of America, Local 1030 (Respondent) (*Dismissed*)

APPLICATIONS FOR DETERMINATION OF EMPLOYEE STATUS

2013-95-M: Canadian Union of Public Employees and its Local 1287 (Applicant) v. Township of West Lincoln (Respondent) (*Granted*)

2762-95-M: London Public Library Board (Applicant) v. Canadian Union of Public Employees, Local 217 (Respondent) (*Withdrawn*)

COMPLAINTS UNDER THE OCCUPATIONAL HEALTH AND SAFETY ACT

2870-96-OH: Teresita Lanuza (Applicant) v. The Toronto Hospital (Respondent) v. Ontario Nurses' Association (Intervener) (*Dismissed*)

3132-96-OH: Jose Goncalves (Applicant) v. Starline Industries Inc. (Respondent) (*Withdrawn*)

3417-96-OH: Ron Burak (Member Local 1005 U.S.W.A) (Applicant) v. Stelco Inc. (Hilton Works), Peter Breichmanas Divisional Superintendent Plate & Strip Division, Jim White Superintendent 56" Hot Strip Mill, Rick Estok Management Certified Rep. & Management Rep. on P&S Div. JHSC (Respondent) v. United Steelworkers of America, Local 1005 (Intervener) (*Withdrawn*)

0080-97-OH: Steven Karikas (Applicant) v. Honeywell Limited/Honeywell Ltee. (Respondent) (*Dismissed*)

0800-97-OH: Mark W Klocker (Applicant) v. Ontario Hydro, Pickering Nuclear Generating Station, Construction Div. Bob Keeler (General Foreman) Projects and Modifications (Respondent) (*Withdrawn*)

COLLEGES COLLECTIVE BARGAINING ACT

4267-96-U: Ontario Public Service Employees Union ("the Union") (Applicant) v. Council of Regents for the Colleges of Applied Arts and Technology ("the Council") (Respondent) (*Withdrawn*)

CONSTRUCTION INDUSTRY GRIEVANCES

1051-94-G: Local 787, United Association of Journeymen and Apprentices of the Plumbing and Pipefitting Industry of the United States and Canada (Applicant) v. Johnson Controls Ltd. (Respondent) (*Withdrawn*)

2222-95-G: Carpenters and Allied Workers Local 27 United Brotherhood of Carpenters and Joiners of America (Applicant) v. Ideal Railings Limited (Respondent) (*Dismissed*)

3052-95-G: The International Brotherhood of Electrical Workers Local Union 402 (Applicant) v. The Electrical Contractors Association of Thunder Bay (Respondent) (*Granted*)

4054-95-G: United Association of Journeymen and Apprentices of the Plumbing and Pipefitting Industry of the United States and Canada, Local Union 46 (Applicant) v. Gall Construction Ltd. c.o.b. as Acapulco Pools (Respondent) (*Endorsed Settlement*)

4113-95-G: International Association of Bridge, Structural and Ornamental Iron Workers, Local 736 (Applicant) v. Canron Inc. (Respondent) (*Withdrawn*)

4213-95-G; 4214-95-G: Labourers' International Union of North America, Local 1089 (Applicant) v. Rich Mac Construction Co. Ltd., and C & C Enterprises Electrical Construction Limited (Respondents) v. United Brotherhood of Carpenters and Joiners of America, Local 1256, United Association of Journeymen and Apprentices of the Plumbing and Pipe Fitting Industry of the United States and Canada, Local 663, International Brotherhood of Electrical Workers, Local 530, International Association of Bridge, Structural and Ornamental Iron Workers, Local 700 (Interveners) (*Withdrawn*)

0587-96-G; 2026-96-G; 3193-95-G: The United Association of Journeymen and Apprentices of the Plumbing and Pipefitting Industry of the United States and Canada, Local Union 46 (Applicant) v. Downsview Plumbing & Heating Company Ltd. (Respondent) (*Withdrawn*)

1915-96-G; 2196-96-G: International Brotherhood of Electrical Workers, Local 353 (Applicant) v. Cablecom International Network Cabling Inc. (Respondent) (*Withdrawn*)

2181-96-G: Drywall Acoustic Lathing and Insulation Local 675 of the United Brotherhood of Carpenters and Joiners of America (Applicant) v. Daltra Limited and 737049 Ontario Ltd. c.o.b. as D'Luxe Drywall (1987) and Battlefield Drywall Inc. (Respondents) (*Granted*)

2344-96-G: International Union of Operating Engineers, Local 793 (Applicant) v. Danruss Contracting (1985 Windsor) Inc. (Respondent) (*Withdrawn*)

2657-96-G: Labourers' International Union of North America, Local 183 (Applicant) v. Centro Masonry Limited, and Dalton Masonry Limited, and Delview Construction Limited (Respondents) (*Dismissed*)

3079-96-G: United Association of Journeymen and Apprentices of the Plumbing and Pipefitting Industry of the United States and Canada, Local 552 (Applicant) v. INC Contractors Ltd. and Esken Mechanical Contractors Inc. (Respondents) (*Withdrawn*)

3223-96-G; 3225-96-G: Labourers' International Union of North America, Local 1059 (Applicant) v. University of Western Ontario, UWO Research Park, Gaines Construction and Development Company, Harper Masonry Inc., and Ellis-Don Construction Ltd. (Respondents); International Union of Bricklayers and Allied Craftsmen, Local 5 (Applicant) v. University of Western Ontario, UWO Research Park, Gaines Construction and Development Company, Harper Masonry Inc., and Ellis-Don Construction Ltd. (Respondents) (*Terminated*)

3346-96-G: Labourers' International Union of North America Local 183 (Applicant) v. King-Con Construction Ont. Ltd. (Respondent) (*Endorsed Settlement*)

3377-96-G: United Brotherhood of Carpenters and Joiners of America, Local 1256 (Applicant) v. Toronto Dominion Bank (Respondent) (*Granted*)

3447-96-G: International Brotherhood of Painters and Allied Trades, Local Union 1795 (Applicant) v. Felice Aluminum & Glass (Respondent) (*Granted*)

3695-96-G: International Brotherhood of Painters and Allied Trades, Local 1819, Glaziers (Applicant) v. Harrison Glass & Mirror Co. Limited, Steven Duck c.o.b. as County Glass and Door, 655639 Ontario Limited, 655639 Ontario Limited operating as Dial One Minden Glass, Steven Duck operating as Pro Glass Services and/or Pro Glazing Services (Respondents) (*Granted*)

4263-96-G: International Union of Elevator Constructors, Local 50 (Applicant) v. Schindler Elevator Corp. (Respondent) (*Withdrawn*)

4268-96-G: Carpenters and Allied Workers Local 27 United Brotherhood of Carpenters and Joiners of America (Applicant) v. 607015 Ontario Inc., Exterior 59959 Finish Carpentry Ltd. sometimes c.o.b. as Joe Monteiro Developments (Respondents) (*Endorsed Settlement*)

0625-97-G: Sheet Metal Workers' International Association, Local 30 (Applicant) v. Earls court Metal Industries Ltd. (Respondent) (*Endorsed Settlement*)

0845-97-G: The United Brotherhood of Carpenters and Joiners of America, Local 785 (Applicant) v. Downsview Drywall Limited (Respondent) (*Withdrawn*)

0939-97-G: International Brotherhood of Painters and Allied Trades Local 1891 (Applicant) v. C.P.L. Drywall & Acoustics (Respondent) (*Withdrawn*)

0951-97-G: Labourers' International Union of North America Local 183 (Applicant) v. Victory Framing Ltd. (Respondent) (*Granted*)

0956-97-G: Labourers' International Union of North America, Local 1089 (Applicant) v. Sherway Contracting (Windsor) Ltd. (Respondent) (*Withdrawn*)

0984-97-G: United Brotherhood of Carpenters & Joiners of America Local 494 (Applicant) v. Eastern Construction Co. Ltd. (Respondent) (*Endorsed Settlement*)

0998-97-G: International Association of Bridge, Structural, Ornamental and Reinforcing Iron Workers, Local 721 (Applicant) v. Kennick Construction (Respondent) (*Granted*)

1002-97-G: International Union of Elevator Constructors, Local 50 (Applicant) v. Otis Canada, Inc. (Respondent) (*Withdrawn*)

1026-97-G: Drywall Acoustic Lathing and Insulation Local 675, United Brotherhood of Carpenters and Joiners of America (Applicant) v. Commco Construction Inc. (Respondent) (*Endorsed Settlement*)

1029-97-G: United Brotherhood of Carpenters & Joiners of America Local 494 (Applicant) v. Carrier Mausoleum Construction (Respondent) (*Endorsed Settlement*)

1030-97-G: International Association of Heat and Frost Insulators and Asbestos Workers, Local 95 (Applicant) v. Industrial Commercial Insulation & Contracting (Sault) Ltd. (Respondent) (*Withdrawn*)

1031-97-G: International Association of Heat and Frost Insulators and Asbestos Workers, Local 95 (Applicant) v. D & F Insulation Ltd. (Respondent) (*Granted*)

1037-97-G: Drywall Acoustic Lathing and Insulation Local 675 of the United Brotherhood of Carpenters and Joiners of America (Applicant) v. Wall II Wall Stucco Systems Inc. (Respondent) (*Withdrawn*)

1079-97-G: International Union of Operating Engineers, Local 793 (Applicant) v. Process Crane Services Inc. (Respondent) (*Withdrawn*)

1110-97-G: Sheet Metal Workers' International Association, Local 30 (Applicant) v. A.S.M. (Respondent) (*Endorsed Settlement*)

1122-97-G: International Union of Operating Engineers, Local 793 (Applicant) v. All Canada Crane Rental Corp. (Respondent) (*Withdrawn*)

1123-97-G: International Union of Operating Engineers, Local 793 (Applicant) v. J. Lepera Paving, Contracting & Engineering Ltd. (Respondent) (*Granted*)

1125-97-G: International Brotherhood of Painters & Allied Trades, Glaziers Local 1819 (Applicant) v. Kub Glass & Mirror Installations (Respondent) (*Endorsed Settlement*)

1133-97-G: Carpenters & Allied Workers Local 27, United Brotherhood of Carpenters and Joiners of America (Applicant) v. 1046617 Ontario Limited o/a Top Notch Construction (Respondent) (*Endorsed Settlement*)

1134-97-G: Carpenters & Allied Workers Local 27, United Brotherhood of Carpenters and Joiners of America (Applicant) v. 842283 Ontario Limited o/a Mobile Door Control Services (Respondent) (*Endorsed Settlement*)

1146-97-G: Sheet Metal Workers' International Association, Local 235 (Applicant) v. Riverside Aluminum & Building Limited (Respondent) (*Endorsed Settlement*)

1175-97-G: International Brotherhood of Painters & Allied Trades, Glaziers Local 1819 (Applicant) v. Hardie Glass & Aluminum Inc. (Respondent) (*Endorsed Settlement*)

1198-97-G: United Brotherhood of Carpenters and Joiners of America, Local 1988 (Applicant) v. Kanata Forming Ltd. (Respondent) (*Withdrawn*)

1199-97-G: Drywall Acoustic Lathing and Insulation Local 675 of the United Brotherhood of Carpenters and Joiners of America (Applicant) v. Eric Duchesne M.E.M. Contracting (Respondent) (*Granted*)

1235-97-G: International Union of Operating Engineers, Local 793 (Applicant) v. Ron Chunik c/o Business as Ron Michael Contracting Ltd. (Respondent) (*Endorsed Settlement*)

1236-97-G: Sheet Metal Workers' International Association, Local 537 (Applicant) v. Calorific Construction Limited (Respondent) (*Granted*)

1246-97-G: International Union of Operating Engineers, Local 793 (Applicant) v. Diamond Stonebridge Contracting (Respondent) (*Withdrawn*)

1280-97-G: The Ontario Provincial Council of the United Brotherhood of Carpenters and Joiners of America (Applicant) v. The Cooler Guys Inc. (Respondent) (*Granted*)

1310-97-G: International Brotherhood of Painters & Allied Trades, Local 1494 (Applicant) v. Basile Interiors Ltd. (Respondent) (*Granted*)

1311-97-G: Sheet Metal Workers' International Association, Local 269 (Applicant) v. Rogers Engineering Limited (Respondent) (*Granted*)

1312-97-G: International Brotherhood of Painters and Allied Trades, Local Union 1891 (Applicant) v. Ziggy's Contracting (Respondent) (*Withdrawn*)

1313-97-G: International Association of Heat and Frost Insulators and Asbestos Workers, Local 95 (Applicant) v. Precision Insulation (Respondent) (*Withdrawn*)

1314-97-G: International Association of Heat and Frost Insulators and Asbestos Workers, Local 95 (Applicant) v. Q-Tech Limited 663925 Ontario Inc. (Respondent) (*Withdrawn*)

1325-97-G: International Brotherhood of Electrical Workers Local Union 353 (Applicant) v. P.M.C. Power Management Corporation (Respondent) (*Withdrawn*)

1329-97-G: International Brotherhood of Electrical Workers Local Union 353 (Applicant) v. Canber Electric Inc. (Respondent) (*Withdrawn*)

1333-97-G: Labourers' International Union of North America, Local 837 (Applicant) v. Duron Ontario Ltd. (Respondent) (*Endorsed Settlement*)

1334-97-G; 1335-97-G: Teamsters Local Union No. 230 (Applicant) v. Armbro Construction Limited (Respondent) (*Terminated*)

1362-97-G: International Union of Elevator Constructors, Local 50 (Applicant) v. CEE Elevator Service Ltd. (Respondent) (*Withdrawn*)

1391-97-G: Carpenters and Allied Workers Local 27, United Brotherhood of Carpenters and Joiners of America (Applicant) v. Royal Pine Homes Ltd. (Respondent) (*Granted*)

1398-97-G: Sheet Metal Workers' International Association, Local 30 (Applicant) v. John C. Rogers Engineering Ltd. (Respondent) (*Granted*)

APPLICATIONS FOR RECONSIDERATION OF BOARD'S DECISION

0187-96-U: Iqbal Ahmed Quraishi (Applicant) v. Lily Cups Inc., Graphic Communications International Union, Local 100-M (Respondent) (*Withdrawn*)

1593-96-FC; 1594-96-U; 1628-96-U: National Automobile, Aerospace, Transportation and General Workers Union of Canada (CAW-Canada) (Applicant) v. Dover Corporation (Canada) Limited Industrial Division (Respondent); National Automobile, Aerospace, Transportation and General Workers Union of Canada (CAW-Canada) (Applicant) v. Dover Corporation (Canada) Limited, Industrial Division, Burns International Security Services Limited and Fred Collins (Respondent) (*Denied*)

2249-96-OH: Edward Heald (Applicant) v. The Board of Education for the City of North York (Respondent) (*Denied*)

3192-96-U: Azim Babu Ramji (Applicant) v. Textile Processors Service Trade, Employees International Union Local #351A, Metropolitan Toronto Convention Centre Corporation, Laundry & Linen Drivers & Industrial Workers Union Teamster Local 847 (Respondents) (*Dismissed*)

3899-96-U: Sylvia Marguerite Bourgeois (Applicant) v. London and District Service Workers' Union, Local 220 (Respondent) v. London Health Sciences Centre (Intervener) (*Dismissed*)

0282-97-R: Carpenters and Allied Workers Local 27 United Brotherhood of Carpenters and Joiners of America (Applicant) v. Northam Development Corporation and/or Northam Construction Corp. (Respondent) (*Dismissed*)

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